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No.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LONG BEACH EQUITIES, INC.,
Petitioner,
vs.
COUNTY OF VENTURA, CALIFORNIA, and CITY OF SIMI VALLEY, CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION SIX

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents questions which are related to, but in a broader context than, those already accepted for review in *Lucas v. South Carolina Coastal Council, cert. granted*, no. 91-453, *PFZ Properties, Inc. v. Rodriguez, cert. granted*, no. 91-122, and *Yee v. City of Escondido, cert. granted*, no. 90-1947.

1. Where land use regulations, adopted for an otherwise proper municipal purpose, leave the owner of 250 acres of vacant land purchased for residential development with no economically viable use and no way to realize distinct, investment-backed, profit expectations, has a taking occurred which requires compensation under the Fifth and Fourteenth Amendments to the U.S. Constitution?

2. Where local government agencies have made it clear that development of vacant land will not be permitted during at least the next decade, making it impossible for the current owner of the property to have any chance even to recoup its investment because the costs of carrying the vacant land for that long would be prohibitive, is the dispute "ripe" for litigation?

3. When the reasons proffered by a municipality for preventing the use of land are devoid of factual support, has the landowner been denied substantive due process of law?

PARTIES TO THE PROCEEDING

The parties are listed in the caption. In trial court proceedings, Marr Ranch Associates, owner of neighboring property, was also a plaintiff.

RULE 29.1 STATEMENT

Long Beach Equities, Inc. is a wholly owned subsidiary of Long Beach Service Corporation, a holding company of Long Beach Bank, a state savings bank.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a Writ of Certiorari issue to review a judgment and order of the California Court of Appeal, Second Appellate District, Division Six.

OPINIONS BELOW

The California Court of Appeal issued its first (unpublished) opinion on March 15, 1991. (App. A) After granting a rehearing (App. B), the Court of Appeal issued a different opinion on June 27, 1991. (App. C) That opinion was then modified on July 25, 1991. (App. D) The final opinion was published at 231 Cal. App. 3d 1016. The California Supreme Court denied review by an unpublished order on September 26, 1991. (App. E) The trial court orders reviewed on appeal are unpublished and appear in Appendix F.

JURISDICTION

This case involves a regulatory taking of 250 acres of undeveloped land suitable for single family residential development which the Respondent County and City have prevented from being used for any viable purpose.

The Petitioner (LBE) sought relief under the Fifth and Fourteenth Amendments to the U.S. Constitution from the California Superior Court because the governmental action had taken their property without compensation, deprived them of property without due process of law, and denied them equal protection of the laws. The federal questions were thus raised at the earliest opportunity and were briefed and argued in all California courts.

The Superior Court dismissed the case against the County, but permitted the case against the City to proceed. (App. F) The Court of Appeal, however, ordered both cases dismissed.

(App. C) The timely Petition for Review was denied by the California Supreme Court on September 26, 1991. (App. E)

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1. . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

Pertinent provisions of County and City ordinances are noted in Appendix C.

STATEMENT OF THE CASE

In 1984, LBE purchased a 250 acre parcel of the 2,800 acre Marr Ranch in an unincorporated part of Ventura County, California, near the City of Simi Valley. That purchase was made only after both the County and the City assured LBE that both entities believed that the property was uniquely suited for immediate residential development. Both General Plans provided for 1730 homes on the entire Marr Ranch, with 1100 of them on LBE's property. (CT [Clerk's Transcript on appeal] 139, 146, 761, 771-72, 775)

Based on those representations, LBE purchased the property and began working with the City (as required by the County, which anticipated the property would be annexed by the City) to achieve development. At the City's request, LBE prepared a Specific Plan for the entire Marr Ranch (10 times LBE's acreage) and paid for an EIR for development of

the entire Ranch. The City became the applicant for the Specific Plan. While the Specific Plan was being processed, and at the City's encouragement and request, LBE paid to have infrustructure being installed in neighboring developments built to a sufficient capacity to serve 1100 Marr Ranch homes. When the City modified its grading ordinance, LBE modified the Specific Plan and proposed a General Plan amendment to reduce the units on the Marr Ranch property from 1730 to 1059. (CT 144-47, 765, 767-68 771-72)

Then, abruptly, the City imposed a moratorium on processing all new projects and stopped processing the Specific Plan for this property. Thereafter, the City revised its General Plan, reducing the desired number of homes to 325. LBE again changed course in response to the City's desires and prepared a plan for 249 homes. But the City won't process that application until LBE prepares a new Specific Plan for the entire 2800 acre area, not just its own 250 acre tract. (CT 147-48, 776-77)

City employees told the County Board of Suprervisors that it would take 8 to 10 years for LBE to complete the Specific Plan/EIR process now demanded, and then obtain project approval, and then seek some of the few building permit allocations now permitted under the City's "slow growth" ordinance. (CT 149, 777-78)

Meanwhile the County — in whose jurisdiction the property was and remains — has refused to permit development. While LBE was attempting to deal with the City (as the County insisted), the County rescinded the applicable part of its General Plan, imposed an "urban reserve overlay" (meaning that the property was available only for urban development), and downzoned the property so drastically that only 1 home can be built on it. When LBE sought to process a rational, 249 home project through the County, the County refused even to provide LBE with an application form, although it had processed similar applications from

other landowners who were legally indistinguishable. (CT 153-54, 784)[1]

Frustrated by the administrative run-around described above, and having been told by the County that it would have to seek justice somewhere other than from the County (CT 155, 786), LBE filed suit to vindicate its Constitutional rights. (CT 1)

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Many people believed that, with the decisions this Court issued in 1987,[2] much of the lower court confusion surrounding issues of regulatory taking would disappear. For, in its 1987 decisions, this Court supplied substantially more guidance to lower courts than they had possessed before.

Important questions were left unanswered, however, and commentators from all points of the spectrum have observed the significance of the issues remaining undecided. State courts remain frustrated, as this comment by the Supreme Court of Washington attests:

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[1] Additional facts are discussed as appropriate in this Petition. Please note that the City and the County — individually and jointly — have prevented LBE from using its land. The separate actions of these 2 entities are important. One of the problems with the Court of Appeal's opinion is that it tends to treat both entities as part of a single development process. They are not. Each is responsible for its own actions. Each bears individual responsibility here.

[2] Including *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 U.S. 304; *Nollan v. California Coastal Commn.* (1987) 483 U.S. 825; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470; and *Hodel v. Irving* (1987) 481 U.S. 704.

> "Despite these attempts [i.e., *First English, Nollan,* and *Keystone*], the definitive answers, so *necessary* for state courts to make reasoned determinations concerning minimum federal due process requirements, remain *unavailable.* Our task is *complicated* further by the *ambiguities* contained in recent Supreme Court decisions and by the fact that despite a 3-month separation, recent cases do not cite each other. As Justice Stevens observed, '[e]ven the wisest lawyers would have to acknowledge *great uncertainty* about the scope of [federal regulatory] takings jurisprudence.' " (*Orion Corp. v. State* [1987] 109 Wash. 2d 621, 653; emphasis added.)

The lower courts have been unable to arrive at any coherence. Much of the confusion which existed before 1987 continues now, nearly half a decade later.[3]

Thus, in spite of this Court's earlier efforts to clarify the law, it remains possible to find regulatory taking decisions to support virtually any point of view one wishes to espouse.

Guidance from this Court is made all the more necessary because the core issue in these cases is the meaning of the 5th Amendment. The interpretation and application of that Amendment's protection should not be made to depend on the State in which a property owner happens to own land. However, because this Court has held that litigation cannot be considered by the federal judiciary until *after* the state courts have decided whether compensation for a taking will be made under state law (*Williamson County Reg. Plan. Commn. v. Hamilton Bank* [1985] 473 U.S. 172), state courts

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[3] Illustrative is the litigation which has continued to rage in California, notwithstanding that this Court pointedly told the California judiciary that it was not affording to property owners the protections guaranteed by the 5th Amendment's Just Compensation Clause (*First English*, 482 U.S. at 311; *Nollan*, 483 U.S. at 839).

will continue to be the usual locus of decisionmaking in these cases. It is thus imperative that those 50 local jurisdictions have clear guidelines to follow in applying protection which derives from the U.S. Constitution and which will ultimately be measured by adherance to that organic charter.

This case presents the opportunity to end major elements of uncertainty still facing lower courts. Issues which appear in most of the cases now being litigated are before the Court in this Petition:

- the extent to which a property owner's "distinct, investment-backed profit expectations" are protected by the Just Compensation Clause against regulatory interference;
- the nature of the allegations which a property owner needs to plead to establish a *prima facie* case of either regulatory taking or substantive due process denial; and
- the scope, meaning, and elements of the requirement that a regulatory taking be "ripe" before it is eligible for judicial review.

Lower state and Federal courts are in acute disharmony on how to decide these issues, thus increasing the confusion among property owners and regulators about their respective duties and responsibilities. Litigation abounds, without resolution on the merits and with contradictory results. Professor Williams put it pungently, but accurately, in his nationally recognized text:

> "If there are no rules specific enough to control future decisions, then every case is decided according to the *gastronomic school of jurisprudence*; that is, this is an area where government acts according to *gut feeling* in the individual case, instead of by rule of law." (1 N. Williams, *American Land Planning Law* [rev. ed. 1988] 136; emphasis added.)

The situation in the lower courts is as chaotic as one would expect from a "gastronomic school of jurisprudence" operating on "gut feeling in the individual case instead of by rule of law." Lack of "ripeness," for example, is now raised as a defense in virtually every regulatory taking case. As happened here, prodigous time, effort, and money are expended in a chimerical effort to determine whether the case is "ripe" enough for the court to examine the merits, even though all parties know the reality that their positions have hardened to the point of presenting a concrete controversy. Because the outlines of "ripeness" have no more than Will-o'-the-wisp substance, treatment of the issue is not consistent from State to State or Circuit to Circuit.

This case presents the opportunity for this Court to explain in a comprehensive way how the concepts of "ripeness," investment-backed expectations, substantive due process, and the guarantee of the Just Compensation Clause are supposed to function in the land development context. Such guidance would be a blessing to all concerned who, at present, are compelled to litigate cases to the last available court in order to find an answer. It becomes essential when the question would be answered differently on the same facts in a different jurisdiction. At a minimum, this Court's explication would lessen the burden on the judiciary by letting the participants in the land use process know precisely what needs to be done before the attention of the judiciary is available, and what sorts of controversies are entitled to be litigated at all.

I. THERE IS NO COHERENT RULE APPLIED IN THE LOWER COURTS GOVERNING WHAT IT TAKES TO ESTABLISH A REGULATORY TAKING

In its recent regulatory taking cases, this Court has indicated that a taking occurs if a regulation deprives a

property owner of "economically viable use" of his land,[4] and that a property owner's "reasonable, investment-backed, profit expectations" are protected against confiscation by state and local government land use regulations.[5] The problem is that this Court has neither defined these terms nor given guidance to lower courts in determining their meaning. As the 1980's began, a noted commentator lamented:

> "In 1978, the Supreme Court, after 91 years of producing nearly all the leading police power taking decisions, essentially gave up. Viewing the facts of *Penn Central* . . . as presenting a question of police power takings, the Supreme Court announced that there was no 'set formula' to resolve the question. Rather, said the Court, different fact patterns require different approaches for solution." (Stoebuck, *Police Power, Takings, and Due Process*, 37 Wash. & Lee L. Rev. 1057, 1068 [1980]).

Things haven't changed much, as a more recent survey concluded:

> "[T]his area of the law *has not been clarified* and the courts continue to generate *contradictory opinions* utilizing various aspects of the extant 'formulas,' none of which have garnered anything approaching a consensus in the view of bench, bar, and academe." (*1988 Zoning and Planning Law Handbook* 342 [Gordon, ed., 1988]; emphasis added.)

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[4] E.g., *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260; *United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, 126; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 485.

[5] E.g., *Williamson County Reg. Plan. Commn. v. Hamilton Bank* (1985) 473 U.S. 172; *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104.

Thus, lower courts have generally sought to determine these issues by doing what judges and lawyers are most comfortable doing: examining the diminutions in value in earlier cases which were held not to constitute a taking.[6]

That creates another problem: the older cases were decided *before* this Court announced either the concept of "economically viable use" or the concept of "reasonable, investment-backed, profit expectations,"[7] not to mention the rules announced or emphasized in *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 U.S. 304 and *Nollan v. California Coastal Commn.* (1987) 483 U.S. 825. Moreover, the decisions of this Court which appear in this earlier group were either decided at a significantly earlier and less complicated time in land economics and land use control sophistication, or were decided in the context of pleadings or proof which did not present the issue of whether the questioned regulation was confiscatory.

Clarification in the context of today's realities is not only warranted, it is sorely needed by all participants in the process.

A. There is Confusion in the Lower Courts About the Meaning of "Economically Viable Use" of Property

Twelve times in the last decade or so, this Court has noted that, if a regulation deprives a property owner of the

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[6] E.g., *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365; *Hadacheck v. Sebastian* (1915) 239 U.S. 394; *William C. Haas Co. v. City of San Francisco* (9th Cir. 1979) 605 F.2d 1117.

[7] Neither concept appears in land use cases in any court before this Court's decision in *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, in which they were first enunciated.

"economically viable use" of his property, a taking has occurred.[8]

However, in *none* of those cases did the Court explain how to determine economic viability. The phrase was simply stated and then lower courts were left to shift for themselves. Lower courts have developed no consistent, or even predictable, definition.

Commentators are in accord that chaos is the rule. The following is typical:

> "This virtually *standardless* inquiry has provided *little predictability* for property owners, nor has it served as a reliable guide for government action." (Lawrence, *Regulatory Takings: Beyond the Balancing Test* [1988] 20 The Urban Lawyer 389, 400; emphasis added.)[9]

As the 9th Circuit put it, ". . . the precise meaning of 'economically viable use' of land is elusive and has not been clarified by the Supreme Court." (*Lake Nacimiento Ranch Co. v. San Luis Obispo County* [9th Cir 1987] 841 F.2d 872,

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[8] *Kirby Forest Indus., Inc. v. United States* (1984) 467 U.S. 1, 14; *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260; *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, 124; *Kaiser Aetna v. United States* (1979) 444 U.S. 164, 174 n. 8; *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 U.S. 621, 653 (dissenting opinion); *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340; *Nollan v. California Coastal Commn.* (1987) 483 U.S. 825; *Keystone Bituminous Coal Assn. v. DeBenidictis* (1987) 480 US 470; *United States v. Riverside Bayview Homes* (1985) 474 U.S. 121; *Williamson County Regional Planning Commn. v. Hamilton Bank* (1985) 473 U.S. 172; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981) 452 U.S. 264; *Schad v. Borough of Mount Ephraim* (1981) 452 U.S. 61.

[9] For similar assessments, see, e.g., *1988 Zoning and Planning Law Handbook* 14, 342 (Gordon, Ed., 1988); 1 Williams, *American Land Planning Law* [1988 Cum. Supp.] 53.

877) In that case, the absence of standards permitted the court to ignore testimony that each of the supposedly permitted uses of land had no evonomic value to the property owner.

Here, while acknowledging the "elusive" nature of the concept of economic viability (App. C, p 19), and acknowledging that the County zoned the property so as to permit one home on each 160 acres of land (App. C, p 22), the court below concluded that no taking occurred. Aside from the erroneous assertion by the court that LBE could have sought rezoning to 10 acre parcels (App. C, p 23),[10] the possibility and value of available uses is a question of *fact*, which cannot be decided on the pleadings.

The confusion extant in the law permits this sort of result. Clarity from this Court would be reflected in clarity and consistency below.

B. There is Conflict Among Lower Courts About Whether Trial of the Facts is Required to Find That a Regulation "Substantially Advances a Legitimate State Interest" or Whether that Finding can be Made as a Matter of Law

As an alternative, the cases cited above hold that a taking occurs when a land use regulation fails to substantially advance a legitimate state interest. There is, however, no lower court agreement on how to make this determination.

The conflict on this issue is starkly apparent when the California Court of Appeal opinion in this case is set beside the nearly contemporaneous decision of the 9th Circuit Court

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[10] It could not. The County refused to process any such applications.

of Appeals in *McDougal v. County of Imperial* (9th Cir. 1991) 942 F.2d 668.

In the case at bench, LBE attacked the County and City ordinances for, among other things, being unnecessary to accomplish their stated goals of ensuring that sufficient facilities were available to support additional housing. The reason for that was that LBE had already seen to it that adequate infrastructure was available for far more than the number of homes it sought to build. Thus, LBE sought a trial at which it would prove that the ordinances being used to prevent development of its property failed to substantially advance a legitimate state interest because infrastructure already existed to support this development.

The California Court of Appeal refused to permit trial. Rather, it concluded *as a matter of law, without any evidence*, that the governmental prohibitions were necessary. Rather than examining evidence, the California court dealt in sweeping generalities like this:

> "Local government legislation is constitutional on its face if it bears 'a substantial relationship to the public welfare . . .' and inflicts no irreparable injury on the landowner. [Citation.] . . .
>
> "Both County's Guidelines and City's Growth Management Ordinance satisfy this test. The County enacted the Guidelines to promote efficient and effective delivery of community services and to conserve the resources of County by encouraging urban development to occur wihin cities. The Guidelines emphasize annexation as a means to accomplish these purposes." (App. C, p 11)

In sharp contrast, the 9th Circuit's *McDougal* opinion holds that such decisions must be based on a critical examination of evidence and cannot be made as a matter of law on a motion to dismiss (the functional equivalent of the demurrer rulings in this state court proceeding):

"The district court held that the McDougals 'failed to establish that the County's actions do not substantially advance a legitimate state interest.' However, they have no obligation to 'establish' the illegitimacy of the County's motivations on a motion to dismiss. Likewise, the McDougals allege that the requirements for a conditional use permit and a verified ground water model were impossible to satisfy and did not relate to legitimate concerns of the County, but the district court's order gives no consideration to these charges.

"The legitimacy of the public interest involved, how much it is furthered by the regulatory actions at issue, the extent of the public benefit obtained or expected, and the degree that the McDougals' property rights and reasonable investment-backed expectations have been impaired are all factors which lie at the heart of the takings inquiry. *These things typically cannot be assessed properly without a factual inquiry.* [Citation.]" (942 F.2d at 679-680; emphasis added.)

The decision in the case at bench and *McDougal* CANNOT both be correct. Either a factual inquiry is needed or the issue is one of law. This stark conflict is endemic to this field of the law. Anarchy will continue to reign, with courts randomly choosing whichever approach will best serve their desires of the moment, until this Court ends the conflict and confusion.

C. There is Confusion in the Lower Courts About What This Court Meant by "Reasonable, Investment-Backed, Profit Expectations"

Sixteen times in the last decade or so, this Court has noted that the question of whether a regulation effects a taking of private property for public use must be analyzed in terms of the impact of the regulation on the property owner's "reasonable [or distinct] investment-backed expectations."[11] In three of those decisions which involved land use regulations, this Court considered the concept of profit or reasonable return on investment.[12]

However, in *none* of those cases, did this Court explain *how* the impact on a property owner's profit expectations was to be considered. It was simply said, and then left unelaborated. As a result, lower courts — as well as all participants in the land use process — have little guidance. While they have been told that the expectation must be more

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[11] *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104; *Andrus v. Allard* (1979) 444 U.S. 51; *Kaiser Aetna v. United States* (1979) 444 U.S. 164; *PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74; *Hodel v. Virginia Surface Min. & Recl. Assn.* (1981) 452 U.S. 264; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419; *Kirby Forest Indus., Inc. v. United States* (1984) 467 U.S. 1; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986; *United States v. Locke* (1985) 471 U.S. 84; *Williamson County Reg. Plan. Commn. v. Hamilton Bank* (1985) 473 U.S. 172; *United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121; *Connolly v. Pension Benefit Guaranty Corp.* (1986) 475 U.S. 211; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470; *Hodel v. Irving* (1987) 481 U.S. 704; *Nollan v. California Coastal Commn.* (1987) 483 U.S. 825.

[12] *Penn Central*, 438 U.S. at 136; *Williamson County*, 473 U.S. at 200; *Keystone*, 480 U.S. at 496, 501.

than a ". . . unilateral expectation or an abstract need . . ." (*Ruckelshaus v. Monsanto Co.* [1984] 467 U.S. 986, 1005) and that the concept has its basis in ideas of ". . . justice and fairness . . ." (*Kirby Forest Indus., Inc. v. United States* [1984] 467 U.S. 1, 14), this Court has given little more.

The Court has not yet taken the opportunity either to reconcile its general formulation of "reasonable, investment-backed expectations" with earlier cases emanating either from the Court itself or from influential lower courts or to overrule any of the earlier cases. It is time for the Court to let the citizens of this country know whether it is serious about its protection against regulatory takings and, if so, how that protection is to be achieved.

For example, in *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, the regulation diminished the value of the property by 75%. In *Hadacheck v. Sebastian* (1915) 239 U.S. 394, the regulation diminished the value of the property by 88%. And in what may be the most eggregious example, the regulation in *William C. Haas Co. v. City of San Francisco* (9th Cir. 1979) 605 F.2d 1117, diminished the value of the property by 95%. No taking was found in any of these cases. Both *Euclid* and *Hadacheck* were decided before this Court's series of cases during the last decade introduced the "expectations" test. *Haas* never discusses the test. Nonetheless, each of the older cases is now cited by lower courts to demonstrate that regulations far more onerous than the one being litigated have been upheld. (See, e.g., App. C, pp 19-22, 25.)

But can these earlier cases be so routinely relied on to determine if there has been a taking? What light is shed on the older cases' validity by the more recent decisions of this Court? *Can* the older cases continue to be uncritically used as benchmarks for how far regulation may diminish property without compensation? How does leaving the property owner with 5% of the value of his land (or 12%, or even 25%) comport with "reasonable, investment-backed, profit

expectations" or "economically viable use?" When that question is posed to a lay audience, the universal response is either groans or nervous laughter.

As a consequence, commentators agree that there is no standard which the lower courts believe they can apply. The result is total unpredictability:

> " 'Investment Backed Expectations.' This is another phrase which has recently been adopted and repeated widely. Again, it is *difficult to know what to make of it* . . . The state *courts have struggled* for a long time over the same question . . . Close analysis of these cases indicates that there is *no consensus* in the vast body of state law on this point; it is an area of almost *pure gut jurisprudence.*" (1 Williams, *American Land Planning Law* [1988 Cum. Supp.] 54-55; emphasis added.)[13]

Neither regulators nor property owners are able to predict with any degree of confidence the outcome in a specific case. Thus, numerous cases are litigated which might otherwise be resolved short of the courthouse. Fundamental Constitutional protections deserve more identifiable road signs than that.

Notwithstanding this Court's repeated employment of the "profit expectations" concept, however, lower courts are in conflict on whether even to accept the notion of profitability as a factor to consider in determining whether a taking has occurred. The Second Circuit and the Ninth Circuit have flagrantly flaunted their rejection of the idea,[14] while the

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[13] For similar reactions, see, e.g., Mandelker, *Investment-Backed Expectations: Is There a Taking?* (1987) 31 J. Urb. & Contemp. L. 3; Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches* (1988) 39 Hast. L. J. 335, 345.

[14] E.g., *Park Avenue Tower Associates v. City of New York* (2d Cir. 1984) 746 F.2d 135; *William C. Haas Co. v. City of San Francisco* (9th Cir. 1979) 605 F.2d 1117; *MacLeod v. County of Santa Clara* (9th Cir. 1984) 749 F.2d 541.

Eighth Circuit, the Eleventh Circuit, the Federal Circuit, and the highest courts of New York, Washington, Arizona, and the District of Columbia have expressed a willingness to determine from the evidence whether the uses permitted by the regulation permit the owner to obtain a reasonable return.[15]

Here, the Court of Appeal acknowledged the "considerable controversy" over whether to examine profit expectations (App. C, p 23), but concluded — again, as a matter of law, without evidence — that LBE could not even raise the issue (App. C, pp 24-25).

The question is: what needs to be alleged? LBE alleged facts showing that it had worked long and hard with both the County and the City to develop plans which were acceptable to the regulators, received assurances from the regulators that the project was acceptable, and then — after the expenditure of millions of dollars in reliance — the regulators decided to preclude development. LBE seeks only the chance to present its case to a trier of fact. Those facts show sufficient interference to warrant trial.

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15 E.g., *Florida Rock Indus., Inc. v. United States* (Fed. Cir. 1986) 791 F.2d 893; *Northern Westchester Professional Park Associates v. Town of Bedford* (1983) 60 N. Y. 2d 492, 458 N.E. 2d 809; *Orion Corp. v. State* (1987) 109 Wash. 2d 621, 642 ("present, possible, and reasonably profitable use"); *Ranch 57 v. City of Yuma* (1986) 152 Ariz. 218, 731 P 2d 113 ("reasonable return on the property"); *Hornstein v. Barry* (D. C. App. 1987) 530 A.2d 1177 ("reasonable financial return"); *Wheeler v. City of Pleasant Grove* (11th Cir. 1987) 833 F.2d 267, 271 ("... the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit"); *Nemmers v. City of Dubuque* (8th Cir. 1985) 764 F.2d 502, 504-05 (reasonable return on the difference in value with and without the offending regulation).

II. THE COURT BELOW CONTINUED CALIFORNIA'S REFUSAL TO FOLLOW THIS COURT'S DECISION IN *FIRST ENGLISH* WHEN IT HELD THAT THE GOVERNMENT'S GOOD INTENTIONS PRECLUDED ANY FINDING OF A TAKING

What happened in the Court of Appeal seems evident: the Court of Appeal agreed with the *goals* announced by the City and the County and, as a consequence, failed to subject those governmental assertions to any scrutiny at all (in sharp contrast to *McDougal*, discussed above), and then went so far as to hold that LBE could be wiped out financially without recourse so long as the governmental intentions were perceived to be legitimate. There is no mistaking the Court of Appeal's theory. These are its own words:

> "Where the public benefits greatly, it is constitutional to restrict the use of one's land. [Citation.] In some cases, *no compensation* may be required *even if* almost all uses are taken. [Citation.]" (App C, p 10; emphasis added.)
>
> "*No taking* results when a partial moratorium measure is enacted to protect the public health, safety or morals. [Citation.]" (App C, p 19; emphasis added.)

That theory is utterly at odds with this Court's *First English* decision, in which it was plainly stated that:

> "This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather *to secure compensation in the event of otherwise proper interference* amounting to a taking." (482 U.S. at 314-315; emphasis added.)

The decision below is also in direct conflict with the 9th Circuit's *McDougal* decision which says:

"We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required even if the land owner is thereby denied all use of his property.

* * *

"To hold that a legitimate public interest alone precludes a taking without regard to the degree of private deprivation turns the Court's balancing of interests into a bright-line test for which there is no precedent. The Court's own disclaimers make this clear. [Citations.]" (942 F.2d at 676, 677)

A. The Decision Below Conflicts With Other Decisions of this Court

This Court has consistently held that good governmental intentions cannot be accomplished in defiance of the Fifth Amendment. *First English* was express on the subject. (482 U.S. at 321) That is also the clear import of cases like *Kaiser Aetna v. U.S.* (1979) 444 US 164, *U.S. v. Security Industrial Bank* (1982) 459 US 70, and *Loretto.*[16] In each of them this Court concluded that properly motivated governmental goals could be accomplished only in compliance with the Fifth Amendment.

In a similar vein, of course, are cases such as *Preseault v. ICC* (1990) 494 U.S. 1, *Ruckelshaus v. Monstanto Co.* (1984) 467 U.S. 986, *Dames & Moore v. Regan* (1981) 453 U.S. 654, and the *Regional Rail Reorganization Act Cases* (1974) 419 U.S. 102. In each of them, this Court was faced with the

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[16] Involving, respectively, public access to a private marina, retroactive application of bankruptcy legislation, and cable TV access to apartment buildings.

claim that Congress, in pursuit of legitimate goals,[17] had taken private property in violation of the Fifth Amendment. In each, this Court directed the property owners to the U.S. Claims Court to determine whether these legitimate exercises of legislative power required compensation.

The decision below elevates good intentions above the Constitution. That, it cannot do.

B. The Decision Below is Typical of California Decisions Since 1987 Which Pay No More Than Lip Service to This Court's Seminal Decision in *First English*

In 1987, this Court bluntly told the California courts that they were out of step with this Court's interpretation of the Just Compensation Clause and with most of the rest of the country, as well:

As this Court put it in *First English*:

> "[T]he California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." (482 U.S. at 311)

Two weeks later, the Court decided *Nollan*. There, striking down as "extortion" (483 U.S. at 837) a standard California Coastal Commission permit condition (repeatedly applied and judicially approved in California), this Court said:

> "Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." (483 U.S. at 839)

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[17] Respectively, the preservation of rail transportation corridors, the registration of pesticides, the aftermath of the Iranian hostage crisis, and the provision of rail service to the Northeast United States.

One would have thought that double-barrelled message would have been clear and that the California judiciary would have responded by providing the protection demanded by this Court and the Constitution. Everyone who thought that has been disappointed. The California courts have continued as though it were "business as usual," apparently counting on this Court's limited capacity to review state court judgments to insulate their continued scofflaw *modus operandi* from review.

The blunt fact, however, is that the California Courts of Appeal have refused to follow this Court's decision in *First English*. (The California Supreme Court has declined to review *any* regulatory taking cases since *First English*.) This began with the remand of *First English* itself, as recently noted by the 9th Circuit Court of Appeals, which said that it did "not believe" that the California court's decision on the *First English* remand was based on "an accurate description of the Chief Justice's opinion . . . ." (*McDougal*, 942 F.2d at 679) That California attitude continues through cases like the one at bench. The analysis in this case makes it clear that the California judiciary remains unwilling to acknowledge that government regulation can run afoul of the Fifth Amendment. The facts alleged here are outrageous. Yet the California courts refused even to permit the matter to go to trial. It is time to return the law of California to that of the rest of the Union.

III. ARBITRARY AND CAPRICIOUS LAND USE REGULATIONS — UNRELATED TO THE PURPOSES SUPPOSEDLY SERVED BY THEM — VIOLATE PROPERTY OWNERS' SUBSTANTIVE DUE PROCESS RIGHTS

The Ninth Circuit recently summarized the rules relating to actions alleging deprivation of substantive due process:

> "We have recognized that the due process clause includes a substantive component which guards against arbitrary and capricious government action, even when the decision to take that action is made through procedures that are in themselves constitutionally adequate. [Citation.]" (*Sinaloa Lake Owners Assn. v. City of Simi Valley* [9th Cir. 1989] 864 F.2d 1475, 1483)

The reason for this type of protection is to guard against the human tendency to overreach:

> "[G]overnmental power is a double-edged sword; if wielded in an abusive, irrational or malicious fashion it can cause grave harm. [Citation.]" (*Sinaloa*, 864 F.2d at 1484)

See also *Bateson v. Geisse* (9th Cir. 1988) 857 F.2d 1300, 1303 (judgment finding substantive due process violation was affirmed because ". . . the interference with property rights was irrational or arbitrary") and *Herrington v. County of Sonoma* (9th Cir. 1987) 834 F.2d 1488, 1501, amended in other respects, 857 F.2d 567 (judgment finding substantive due process violation was affirmed because the County's action ". . . was irrational or arbitrary").

To determine whether a substantive due process violation has occurred, a factual inquiry — resulting in a balancing process — must be performed:

> "[i]n determining whether the constitutional line has been crossed, a court must look to such factors as the need for the [governmental action], the relationship between the need and the [action taken], the extent of [damage] inflicted, and whether [the action was taken] in a good faith effort . . . or maliciously . . . for the very purpose of causing harm." (*Sinaloa*, 864 F.2d at 1486; brackets, the Court's.)

Here, the complaint plainly alleges that there was no rational justification for preventing development of LBE's property. LBE had cooperated with both the County and the City in planning the development of the entire area of which its property was a small part, had contributed money toward the construction of oversized utilities through neighboring properties in order to service the expected development of its own property, and purchased the property only after being assured that its development concepts were compatible with those of the County and City. The complaint alleges that there were adequate facilities to service the LBE development without burdening either the County of the City. Thus, refusal to permit development was irrational, arbitrary, and capricious. Enough was alleged to merit trial.

IV. THERE IS HOPELESS CONFUSION THROUGHOUT THE COUNTRY ON WHAT IT TAKES TO "RIPEN" A REGULATORY TAKING CASE FOR LITIGATION ON THE MERITS

"Ripeness" in land use litigation does not seem to be a concept whose full ramifications have been carefully considered by this Court. Rather, in the course of not deciding the compensation issue in cases which preceeded *First English* during the 1980s, this Court concluded that the facts of the cases before it were, for one reason or another, not sufficiently well-developed to form the basis for such a conclusion.

The rules were plainly developed in an *ad hoc* way, and seem intended to be applied in later cases in a similar *ad hoc* way, depending on the circumstances of those later cases.

However, as illustrated by the case at bench, some lower courts — feeling more comfortable applying rules mechanically — are treating this Court's *ad hoc* determinations as though they were carved on stone tablets and not to be

varied. Because of the rapid proliferation of "ripeness" decisions in the lower courts, this Court's guidance is needed to explain the flexible nature of the investigation required by the "ripeness" concept. In other fields of law, for example, the Court has not discussed "ripeness" in the rigid manner which appears in the land use field. Rather, it has said that the concept must be applied in a ". . . pragmatic way . . ." (*Abbott Laboratories v. Gardner* [1967] 387 U.S. 136, 149) For example, in *Columbia Broadcasting System v. United States* (1942) 316 U.S. 407, a case involving an FCC rule which had not yet been applied to any broadcaster, the Court found a dispute which was ripe for decision:

> "Such regulations have the force of law *before* their sanctions are invoked as well as after. When, as here, they are promulgated by order of the Commission and the *expected* conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack . . ." (316 U.S. at 418-19; emphasis added.)

See also *Maryland Casualty Co. v. Pacific Coal & Oil Co.* (1941) 312 U.S. 270, 273:

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

That description, setting aside municipal game-playing,[18] aptly describes most land use controversies which reach litigation.

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[18] See *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 U.S. 621, 655-656, fn. 22 [Brennan, J., dissenting]; *Nollan*, 483 U.S. at 841; *First English*, 482 U.S. at 321.

A. There Are No Rational Rules

The absence of rational rules is evident merely by examining the land use/ripeness decisions rendered by this Court. The one thing which emerges is that not even the Justices of this Court can confidently say that they know when a land use case is sufficiently ripe.

In *San Diego Gas*, for example, the issues were held not ripe — by a vote of 5-4. *Williamson County* went 6-3 against ripeness. *MacDonald, Sommer & Frates* was a 5-4 decision against ripeness. *First English* was held ripe, 6-3.

Thus, in four recent cases, the Justices of this Court cast 17 votes *for* ripeness and 19 votes *against* ripeness. When even the Justices of this Court have that much trouble agreeing on the ripeness of any particular case, it seems fair to conclude that there are no clear rules operating.

B. There is No Consistency

Nor is there any consistency.

For example, in *Preseault v. ICC* (1990) 494 U.S. 1, this Court held that an action challenging the constitutionality of legislation could not be ripe until after the property owner sought compensation for the legislation's impact. In stark contrast, California's courts hold that an inverse condemnation action seeking compensation cannot be ripe until after the property owner challenges the constitutionality of the legislation. (E.g., *Rossco Holdings, Inc. v. State* [1989] 212 Cal. App. 3d 642.)

In the case at bench, the California Court of Appeal held that "informal" presentations of development proposals *could not* suffice to ripen a controversy, while a panel of the 9th Circuit has held to the contrary. (Compare App. C, pp 14-15 with *Hoehne v. County of San Benito* [9th Cir. 1989] 870 F.2d 529.)

In the case at bench, the California Court of Appeal held that a variance must be applied for to ripen a controversy, while a panel of the 9th Circuit has held to the contrary. (Compare App. C, pp 16-17 with *Herrington v. County of Sonoma* [9th Cir. 1987] 834 F.2d 1488, 1496.)

The vagueness of the requirements of the ripeness requirement in land use cases results in random and inconsistent treatment of parties who are otherwise similarly situated. A more unjust result is hard to picture.

C. The "Rules" Used Below Are So Rigid That They Make No Sense and Ensure the Property Owner Will Lose

The rigidity with which the California court believed *this* Court *required* the ripeness "rules" in *Williamson County* and *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340 to be applied is expressed in the opinion:

> "The developer *must* establish that it has submitted at least one meaningful application for a development project which has been thoroughly rejected, *and* that it has prosecuted at least one meaningful application for a zoning variance, or something similar, which has been finally denied. [Citations.]" (App. C, pp 20-21; emphasis added.)

Thus, the Court below *categorically refused* to examine the facts on the *ad hoc* basis which this Court has repeatedly required. (See, e.g., *Kaiser Aetna v. U.S.* [1979] 444 U.S. 164, 175; *Penn Central*, 438 U.S. at 124.) Instead, the opinion insists that *all* cases must be forced into an immutable template of first applying for a development permit and then applying for a variance before it will consider a case "ripe" for judicial review.

The problem is that the opinion below takes a test designed for the "ad hoc" factual examination of *Williamson*

County and rotely applies it to *all* factual contexts. The inappropriateness of doing that at bench demonstrates the need for this Court to tell lower courts unequivocally that there is no set formula for ripeness, but rather an *ad hoc* examination of the facts of the particular case in light of its peculiar circumstances.

Here, for example, the property owner was faced by two different agencies. The County, which had actual, legal charge over regulation of this property, refused to do anything, abdicating in favor of the City. The City, after much planning and replanning, refused to complete the processing of preliminary planning work needed to permit development. The County also refused to approve any planning and zoning changes which would permit development. Both entities made it clear that development was precluded. No purpose would have been served by jumping through additional theoretical hoops for the sole purpose of "ripening" a case for litigation, as opposed to actually seeking to develop property. What could be more final than statements between governmental decision makers that no approval would be given and that LBE should seek its resolution in court? LBE does not believe this Court intended its ripeness rules to be applied solely as academic exercises, when there is no realistic hope that further action will result in development permission.

In this field, lower courts have even had trouble agreeing on how to determine when it is "futile" for a property owner to continue with fruitless applications:

> "The lower federal court attempts to *wrestle* with the meaning of 'futility' have led to a *bewildering* set of judicial statements." (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report

[July-Aug 1988] 49, 53; emphasis added.)[19]

In *First English*, this Court demonstrated the flexibility intended for the "ripeness" concept which, here, the court below ignored. In *First English*, suit was filed one month after the regulation was adopted — without *any* application for a permit or variance — because the regulation permitted no economically viable use. The County attempted to have this Court dismiss the appeal because of this supposedly "unripe" condition. This Court refused to do so, and dealt with the substantive issue presented.

Thus, where it is clearly alleged[20] that the regulation denies all economically viable use — in contrast to situations like *Williamson County*, where the issue was the *type* of development, not whether there could be *any* reasonable development — *First English* indicates that a case is ripe for adjudication *without more*, because the regulator's final answer is certain.

Two commentators recently surveyed the field and concluded that there is little rhyme or reason to the application of the ripeness concept. Not only did they find differences from one court to another, they found inconsistent results even within the single court which has treated the issue most

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[19] In fields other than land use, this Court has had no trouble recognizing futility and excusing parties from engaging in it as a prelude to litigation. (See, e.g., *Glover v. St. Louis-San Francisco Ry. Co.* [1969] 393 U.S. 324, 330-331 [discrimination by labor union against its members]; *Houghton v. Shafer* [1968] 392 U.S. 639, 640 [denying law book use to prison inmate]; *King v. Smith* [1968] 392 U.S. 309, 312, fn. 4 [denial of AFDC benefits].) In each case, there was an available administrative avenue which, if pursued, theoretically could have yielded the relief sought. This Court lost no time in explaining that there was no requirement to seek theoretically available, but pragmatically futile, relief before filing suit.

[20] Please recall that, like *First English*, this is a pleading case in which no factual inquiry has yet been made by any court. All that is before this Court is the factual allegations in the pleadings.

often. That sort of confusing result cries out for this Court's intervention:

> "The 'finality' requirement has been the *most troublesome* for the lower federal courts *to apply*. Some judges have openly admitted their *difficulty* in determining 'when enough is enough' under this requirement. [Citations.]
>
> "The Court of Appeals for the Ninth Circuit has had the most opportunities to refine this first prong of the ripeness doctrine. But its *decisions have not yet yielded any predictable approach* for plaintiff property owners." (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation* 11 Zoning & Planning Law Report [July-Aug. 1988] 49, 53; emphasis added.)[21]

The reality of the confusion spawned by the ripeness "rules" is that the odds overwhelmingly favor the government. As one government lawyer expressed it, "[l]ike the vagueness of the three-factor analysis [for determining what is a taking], this [ripeness] requirement has historically worked to the advantage of government regulators." (Lawrence, *Regulatory Takings: Beyond the Balancing Test* [1988] 20 The Urban Lawyer 389, 400 fn. 71) The playing field needs to be levelled in order to satisfy the Fifth Amendment protection guaranteed property owners.

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[21] The 9th Circuit's confusion about "futility" has led it to go so far as to hold that, in order for a property owner to prove that it *would be futile to apply* for a permit, the property owner *must actually apply and be turned down!* (*Kinzli v. City of Santa Cruz* [9th Cir. 1987] 818 F.2d 1449, 1454)

CONCLUSION

In *First English* and *Nollan*, this Court declared that the rights of property owners are to be protected by the judiciary against the ". . . cleverness and imagination . . ." of governmental word games (*Nollan*, 483 U.S. at 841), even if that ". . . lessen[s] to some extent the freedom and flexibility of land use planners and governing bodies of municipal corporations . . ." (*First English*, 482 U.S. at 321). In the process, this Court recognized a meaningful, compensatory remedy for regulatory takings.

However, if there is no way to get a regulatory taking case to trial, the remedy is unavailable. If this Court is as serious about Constitutional protection for private property owners as its 1987 decisions indicate and the recent grants of Certiorari in *Yee*, *PFZ*, and *Lucas* appear to reinforce, further explication is needed. Your message is not being heard by many lower courts.

Petitioner prays that Certiorari be granted.

Dated: December 23, 1991.

Respectfully submitted,

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EXHIBIT A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

COURT OF APPEAL-SECOND DIST.
FILED
MAR 15 1991
ROBERT N. WILSON, Clerk

Deputy Clerk

LONG BEACH EQUITIES, INC., etc.,
Plaintiff and Appellant,
v.
COUNTY OF VENTURA, et al.,
Defendants and Respondents.

2d Civil No. B045047
(Super. Ct. No. 103364)
(Ventura County)

THE CITY OF SIMI VALLEY, et al.,
Petitioners,
v.
SUPERIOR COURT OF THE
COUNTY OF VENTURA,
Respondent.

LONG BEACH EQUITIES, INC., et al.,
Real Parties in Interest.

No. B046558

Long Beach Equities, Inc. (LBE) desires to build 249 single-family residences on a 250-acre parcel of land it owns adjacent to the City of Simi Valley (City). LBE contends that land use regulations of the County of Ventura (County) and City, on their face and as applied, will so greatly delay its development plans as to render them economically infeasible.

We hold that this suit is not ripe for adjudication. We affirm the judgment for County and grant City's petition for issuance of a writ of mandate to compel the trial court to enter an order sustaining City's demurrer without leave to amend.

LBE sued these entities seeking damages for inverse condemnation, among other things.[1] The trial court sustained County's demurrer to LBE's first amended complaint without leave to amend. LBE moved for reconsideration and proffered a second amended complaint. The court denied the motion and sustained City's demurrer without leave as to several counts, but overruled that demurrer on counts for inverse condemnation, denial of due process and declaratory and injunctive relief.

LBE appealed the judgment entered on County's demurrer and the ruling rendered on its motion for reconsideration. City filed a petition for a writ of mandate to compel the trial court to vacate its order overruling the demurrer. We have consolidated these actions on appeal in the interest of judicial economy and to aid in the resolution of this lawsuit. (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1272; see 9

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[1] Complainant Marr Ranch Associates is not a party to this appeal. Also, LBE has sued the County Board of Supervisors, the Ventura Planning Commission and the Simi Valley City Council. We shall refer to all County and City defendants as County and City, respectively.

Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 62, pp. 86-87, § 64, pp. 88-89, § 65, pp. 89-90.)

STANDARDS OF REVIEW

LBE has the burden to prove that the trial court abused its discretion in sustaining County's demurrer without leave to amend. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The City has the burden to show that the trial court's order is erroneous as a matter of law and that it will suffer harm which cannot be corrected on further appeal. (*Omaha Indemnity Co. v. Superior Court, supra*, 209 Cal.App.3d at pp. 1273-1274.)

We must construe the allegations of LBE's complaint liberally to attain substantial justice among the parties. (Code Civ. Proc., § 452.) We deem true all material and properly pleaded facts. (*Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 251.) We also shall consider all the matters which have been determined by the trial court as appropriate for judicial notice. (Code Civ. Proc., § 430.30; *First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1368.)[2]

We cannot consider, however, conclusions of fact or law, opinions or speculation and allegations which are contrary either to law or to the judicially-noticed facts. (See *Pan Pacific Properties, Inc. v. County of Santa Cruz, supra*, 81 Cal.App.3d at pp. 251, 255, fn. 2; *Agins v. Tiburon* (1980) 447 U.S. 255, 259, fn. 6.)

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[2] The California Court of Appeal heard *First English Evangelical Lutheran Church v. County of Los Angeles, supra*, 210 Cal.App.3d 1353 (hereinafter cited as *First English II*) on remand from the Unites States Supreme Court in *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304 (hereinafter cited as *First English I*).

BACKGROUND

On June 25, 1969, the Ventura County Planning Commission adopted Guidelines for Orderly Urban Development (Guidelines). The Guidelines were adopted to assure the "efficient provision of urban services and sound urban land use planning" and to avoid "the problems and costs associated with urban sprawl" through coordinated planning with other local government entities.

The Guidelines provide policies, standards and criteria to evaluate applications for zone changes from rural to urban land use classifications and for "related land use development matters."

The Guidelines provide that urban growth of developing communities in Ventura County should proceed in a compact and logically expanding form which includes satisfactory permanent open space areas. Proposed development should be functionally linked to the agencies providing public services in the area for efficiency and accessibility of community facilities, utilities and services, employment centers and cultural opportunities.

Those areas served by the facilities and utilities of a city should be located within the limits of that city; urban development should be required to locate within cities, and proposed developments at the fringe of existing developed areas should be examined for their impact on the costs of governmental services and anticipated revenue.

The stages of development contained in the Ventura County General Plan, in their present form and as revised later, are to be utilized to evaluate development proposals and government actions which spur urbanization.

A revision of the Guidelines in 1976 emphasized that urban development should occur within incorporated cities. Applicants for development within a city's sphere of influence were directed to apply to the appropriate city, instead of the county. Annexation of unincorporated properties was encouraged to ensure that urban services are provided by municipalities rather than by county service areas.

As of 1980, City's General Plan designated the subject area for residential development of a maximum of 1,100 units and for a shopping center.

On September 15, 1981, County's Open Space Plan designated the area of the subject property as open space. This designation generally allows for minimum lot sizes of 10 acres. County also adopted City's General Plan as the Simi Valley Area Plan (the SVAP) portion of the County's General Plan. The County's plan shows an "Urban Reserve overlay" for the area of the property. This overlay contemplates residential development, but it encourages developers to deal directly with the appropriate city to proceed.

LBE alleges that in adopting the SVAP, the County expressly recognized that the property should be developed with urban uses in the densities stated in the text because: (1) the SVAP showed that over 80 percent of the area's valley floor had already been developed; (2) private and public utility and sewer infrastructure had been extended to meet the needs of the development and is more than adequate to provide service at comfortable levels of safety, adequacy and efficiency; (3) development at the density designated is necessary to meet the residential housing needs of the area and to fulfill the County's regional housing obligations; (4) the County recognized the City's desire that the property be developed as shown in the City's General Plan.

In 1984 LBE purchased 250 acres of land located in unincorporated territory adjacent to and within the sphere of influence of City.[3]

LBE alleges that before it purchased the property, the City agreed that if LBE submitted a specific plan for 1,100 units it would be approved. Pursuant to City's request, LBE prepared such a specific plan. It paid all fees for that plan and for an Environmental Impact Report (EIR) on the plan. The City Council then became the applicant for the specific plan which provided for development of 1,730 units on the combined properties. To accommodate new grading ordinances, the specific plan and a proposed general plan amendment were modified to reduce the number of units to 1,059 and to eliminate the shopping center.

LBE helped to pay for oversized infrastructure adjacent to its property which could service the development project at the density set forth above. LBE shared in engineering costs for easements it granted. All necessary infrastructure and public services for the projected residents of the property are in place. LBE asserts that the property would be serviced by county service districts.

In late 1985, City passed an urgency interim ordinance. The ordinance imposed a partial moratorium on approval of various land use permits, particularly in hillside areas, until City could review and revise its General Plan. City enacted the ordinance after it monitored development and land use trends in the community. It realized that various land uses then permitted might conflict with proposed revisions to its General Plan.

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[3] Marr Ranch Associates purchased 2,538 acres in the same area.

City enacted the interim measure to consider those proposals "in an atmosphere of land use stability . . . ." LBE alleges that the ordinance "effectively imposed a moratorium on all processing of major new projects . . . ."

In July 1986, City also adopted a temporary growth management plan which would severely limit the number of building permits to be issued annually. The plan takes note of population trends and includes provisions for reevaluation in 1991 based on facts obtained from the 1990 census. These facts are to be considered in relation to the criteria set forth in the measure, in the revised General Plan and in the County population guidelines. The plan is effective until January 1, 1996.

The plan requires that a developer obtain approval of its proposed project from City, among others, to become eligible for a waiting list to apply for building permits.

The revised City General Plan, adopted in October 1988, designated approximately 325 units for LBE's property. LBE then prepared, but did not file, a tentative map for 249 single family residences to meet the new design criteria of City and County.

City now requires that another specific plan on the entire property be prepared. LBE alleges that this requirement is illegal.

On information and belief, LBE alleges that it would take up to 10 years to proceed with the proposed 249-unit development. LBE would be required to complete a specific plan and an EIR, process other required land use applications and get in line to compete with other development applicants for available building permits.

LBE asserts conclusional allegations that "[t]he inescapable fate of delay" is clear and that its tremendous carrying costs cannot be overcome. It alleges that

its property would diminish in value until it is worth nothing.

Because it "recognized" the "impossibility of developing within the City's jurisdiction, . . ." LBE turned to the County which "foreclosed all development of the Property whatsoever."

County amended its General Plan on May 24, 1988, allegedly to foreclose LBE's development project. County temporarily rescinded the applicable area plan. It downzoned much of the property to OS-160 (open space zoning which allows one unit per 160 acres), and it temporarily precluded all processing of any development in the urban reserve overlay. It denied LBE's prescreening application which sought to amend the County's General Plan.

Around August 1988, County would not let LBE make application to process the project through County. County told LBE it must first apply for a general plan amendment and promote the adoption of a new area plan for Simi Valley. LBE alleges this could take two to three years.

LBE applied for a prescreening application to seek the general plan amendment. The County Board of Supervisors considered LBE's application on January 17, 1989, and denied the application, stating that any development of the proposed project must occur in the City after annexation. This has been the position of County since 1969.

The Complaint

LBE recites these allegations to support its seven causes of action. First, it alleges inverse condemnation. LBE states that City and County's actions in rescinding the area plan, forbidding all development in the urban

reserve overlay, downzoning the property, imposing a de facto or actual moratorium (on development) and imposing a growth-control plan to preclude large scale residential development has resulted in a de facto taking in violation of article I, sections 7 and 19 of the California Constitution and of the Fifth and Fourteenth Amendments to the United States Constitution.

LBE alleges that these actions deprive the subject property of substantially all its value, renders it unmarketable and forbids substantially all reasonable economic beneficial use of the property, thereby thwarting its reasonable investment-backed expectations.

The second cause of action is for denial of substantive and procedural due process. LBE asserts that the defendants have restricted the use of its property to open space without a legitimate purpose and without evidence to support such action.

The third cause of action alleges denial of equal protection because defendants have limited the use of LBE's property to open space in contrast to uses allowed the owners of comparable properties in the County.

The fourth cause of action seeks relief for deprivation of civil rights under 42 United States Code sections 1983 and 1988. LBE alleges that defendants knowingly and wrongfully deprived it of due process, equal protection and just compensation under the California and federal constitutions under color of state law.

The fifth cause of action is captioned conspiracy to deprive plaintiffs of civil rights. It realleges the various actions of City and County as a pattern of conduct intended to deprive LBE of its legal rights under color of state law.

The sixth cause of action seeks declaratory and injunctive relief as to the rights, duties, and obligations

among the parties regarding the various actions alleged in the complaint.

Lastly, LBE seeks a writ of mandate under Code of Civil Procedure section 1085 for abuse of discretion by County in acting in the manner described above.

LBE alleges it exhausted all "reasonable" administrative remedies; or, alternatively, that its attempts to secure such relief would be "impractical and futile."

DISCUSSION

To state a cause of action for inverse condemnation, LBE must plead facts which show either that: (1) the application of the general zoning laws to its property does not substantially advance a legitimate state interest; or (2) such laws deprive it of substantially all economically viable use of its land; or (3) it has been deprived of reasonable investment-backed expectations for the property because of such laws. (*Agins v. Tiburon, supra,* 447 U.S. at pp. 260, 262; also see *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, which refined the first prong of the *Agins* test to require that the regulation advance the precise state interest which avowedly motivated it.)

No precise rule exists to determine when property has been taken by inverse condemnation. (*Agins v. Tiburon, supra,* 447 U.S. at pp. 260-261; *MacDonald, Sommer & Frates v. County of Yolo et al.* (1986) 477 U.S. 340, 348-349.) We start with the proposition that government regulations are presumed to be motivated by and to reasonably serve their avowed purposed. (*First English II, supra*, at p. 1372.) We then weigh the private interest asserted against the public's interest as shown in enactments passed in the exercise of the state's police powers. Where the public benefits greatly, it is constitutional to

restrict the use of a person's land. (*Id.*, at pp. 1366-1367, fn. 10.) In some cases, no compensation may be required even if almost all uses are taken. (*Id.*, at p. 1366.)

Facial Attack on Legislation

Local government legislation is constitutional on its face if it bears "a substantial relationship to the public welfare . . ." and inflicts no irreparable injury on the landowner. (*Agins v. Tiburon, supra,* 447 U.S. at p. 261; *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 395-397.) This is true even where a substantial diminution in value of the property is alleged. (*Agins, supra,* at p. 261.)

Both County's Guidelines and City's growth management ordinances satisfy this test. The Guidelines require the "efficient provision of urban services and sound urban land use planning" to avoid "the problems and costs associated with urban sprawl . . . ."

The criteria in the Guidelines are well designed to accomplish precisely this legitimate purpose. They require compact development within existing cities which can closely link public services, employment and cultural opportunities in an efficient and centralized manner. Such development is intended to include and preserve "satisfactory permanent open space areas . . . ."

LBE argues that County and City's actions to thwart LBE's project are contrary to Government Code provisions which support the development of housing, citing Government Code sections 65583, 65580, and 65581. Although these sections promote the development of residential housing, such development is not encouraged when it destroys needed open space and contributes to urban sprawl. (See Gov. Code, § 65561, subd. (b).)

Government Code section 65561, subdivision (b) promotes the enactment of local ordinances designed to preserve open space; such ordinances discourage the "premature and unnecessary conversion of open-space land to urban uses . . . ." California recognizes that the preservation of open space is necessary to assure "the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources." (Gov. Code, § 65561, subd. (a).)

County's Guidelines are an exercise of the government's police powers which substantially advance the goals of Government Code section 65561, subdivision (a) — to prevent the ill effects of poorly planned urbanization. (*Agins v. Tiburon, supra,* 447 U.S. at p. 261; *First English II, supra,* at p. 1370.) To accomplish these goals, the Guidelines urge landowners such as LBE to apply for annexation to a city to assure that public services will be properly and adequately provided by an existing municipality.

City's growth management ordinance is also designed to accomplish these goals. The City expressly recognizes the need for new jobs, improved shopping facilities and housing opportunities for all the residents of the community.

City enacted the ordinance (No. 638) "to protect the unique, hill-surrounded environment; enhance the quality of life; promote public health, safety or welfare and the general well-being of the community . . . ." By limiting the rate, distribution, quality and type of residential development on an annual basis, with periodic reviews of the ongoing situation, City seeks "to improve local air quality, reduce traffic demands . . . and ensure that future demands for such essential services as water, sewers and the like are met . . . ."

Such government purposes, which protect the public weal, have long been recognized as legitimate. (See *Agins v. Tiburon, supra,* 447 U.S. at pp. 261-262, citing *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 129; *Village of Belle Terra v. Boraas* (1974) 416 U.S. 1, 9; *Euclid v. Ambler Realty Co., supra,* 272 U.S. at pp. 394-395.) Courts will not interfere with a municipality's determination of policy. (*Associated Home Builders Etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 605.)

Ordinances which seek to preserve the surrounding environment and which consider open space and the density of development benefit both developers and the public by "assuring careful and orderly development of residential property with provision for open-space areas." (*Agins v. Tiburon, supra,* 447 U.S. at p. 262.)

Ripeness of Attack on Legislation as Applied

An attack on regulatory legislation as applied to a particular parcel of property is not ripe for adjudication in inverse condemnation unless the plaintiff shows that: (1) the regulation has gone so far that it has accomplished a taking, and (2) that compensation tendered is not just. (*MacDonald, Sommer & Frates v. County of Yolo et al., supra,* 477 U.S. at p. 348; *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty.* (9th Cir. 1987) 841 F.2d 872, 876.)

LBE bears a heavy burden to show that its "as applied" attack is ripe. LBE must first show that City and County have made a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." (*MacDonald, Sommer & Frates v. County of Yolo et al., supra,* 477 U.S. at p. 348.) "A court cannot determine whether a

regulation has gone 'too far' unless it knows how far the regulation goes." (*Ibid.*)

The developer must establish that it has submitted at least one meaningful application for a development project which has been thoroughly rejected, and that it has prosecuted at least one meaningful application for a zoning variance, or something similar, which has been finally denied. (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra,* 841 F.2d at pp. 876-877; see also *Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 187-188; *Kinzli v. City of Santa Cruz* (9th Cir. 1987) 818 F.2d 1449, 1454, as amended at 830 F.2d 968.) Informal or tentative development proposals are insufficient to meet these tests. (*Lake Nacimiento, supra,* at p. 876.)

The test is *not* one of exhaustion of a particular administrative remedy — whether the developer has exhausted all administrative appeals regarding a particular application. The developer must show that it has submitted the appropriate, meaningful applications necessary to proceed with the particular project and that it has received a final rejection of those applications. (*Williamson Planning Comm'n v. Hamilton Bank, supra,* 473 U.S. at pp. 186-190; *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra,* 84[illegible].2d at pp. 876-877.)

The case of *Kinzli v. City of Santa Cruz, supra,* 818 F.2d 1449, a case similar to the instant one, illustrates how these rules apply.

The Kinzli family owned land adjacent to the City of Santa Cruz for many years. Gradually the property became surrounded by urban development.

Through a stipulated judgment in eminent domain, the city successfully obtained four acres of the property for construction of a public street. The city promised the Kinzlis that they could develop the property with high

density uses once the road was built. The city never built the road.

In 1979, the voters passed a slow growth initiative which limited the use of the property to open space until 1990. The measure precluded the city from providing certain urban services in the area in which the property was located.

The city enacted a greenbelt overlay ordinance to implement the initiative. The ordinance set out the requirements to obtain special use permits and the conditions for extensions of urban services to the greenbelt area. Limited single family and accessory structures could be built upon application for special permits. High density development, formerly available and sought by the Kinzlis, was forbidden.

The Kinzlis tried to sell the property on the condition that residential building permits could be obtained. One potential buyer abandoned an application he filed on behalf of the Kinzlis because a government staff engineer told him that the city could not provide water to the property. The Kinzlis did not submit applications for other uses.

In 1980, the Kinzlis sued the city charging that the ordinance, and the city's conduct regarding the condemnation proceedings, violated federal constitutional and civil rights and rights under California laws.

At trial, the court discussed the merits of the taking claim and denied it. The appellate court found that the trial court erred in discussing the merits because the claim was not ripe. Because the Kinzlis had not submitted a "meaningful" development plan or an application for a variance, the appellate court held that the claim should have been dismissed. (See *Kinzli v. City of Santa Cruz, supra,* 818 F.2d at p. 1455.)

Failure to avail oneself of administrative solutions, which might obviate the need to consider constitutional questions, renders a claim for inverse condemnation unripe for adjudication. (*Hodel v. Virginia Surface Min. & Recl. Assn.* (1981) 452 U.S. 264, 297.)

In *MacDonald, Sommer & Frates v. County of Yolo et al., supra,* 477 U.S. 340, the Supreme court rejected as unripe allegations that a city and county unconstitutionally restricted use of its property to open space when it denied a tentative subdivision tract map to build 159 single and multiple family homes. (Pp. 344, 352, fn. 8.) There, as here, the plaintiff urged that any application for a zone change, a variance or other relief would be futile. Its allegations that all principal and accessory uses were no longer permitted and that its property had no value were rejected as speculative and conclusional. (*Id.*, at pp. 345, 351, citing *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. 621, 631-632, fn. 12; and *Williamson Planning Comm'n v. Hamilton Bank, supra,* 473 U.S. at pp. 187-188.)

Denial of approvals for a particular and relatively intensive residential development, as here, cannot be equated with a refusal to permit any beneficial use whatsoever. (*MacDonald, Sommer & Frates v. County of Yolo et al., supra*, 477 U.S. at p. 347.)

In the instant case, LBE has not submitted an application for annexation to City even though the Guidelines, since 1969, have urged developers who propose projects like this one to do so. Nor has LBE applied for a zoning change or variance. The open-space zoning ordinance at issue here has been in effect for the subject property since 1981. The revision of the General Plan is but a temporary situation. If LBE does not want to wait, it could apply for a variance to obtain a designation for 10-acre parcels per residential unit.

Nevertheless, LBE contends that County has foreclosed all developments of its property within County. LBE relies on the following passage from the amended general plan:

"The Urban Reserve overlay designation is applied to all unincorporated land within a city's adopted Sphere of Influence. Although LAFCO has determined these areas to be appropriate for eventual annexation and urbanization, the Urban designation was not applied to all lands within the LAFCO sphere boundaries because it could result in urban development being permitted without annexation. Accordingly, unincorporated lands within spheres have been designated under this General Plan either as Existing Community, Rural, Agricultural or Open Space. Under these designations, therefore, more intense development could not occur on affected lands until they are annexed."

This language does not foreclose all development, but merely restates County's position since 1969 on annexation. The growth management ordinance is a temporary, partial moratorium on certain kinds of development.

If LBE successfully applied for annexation, it could explore other possibilities for development under the growth management ordinance. These possibilities may not reflect what LBE desires to build. This, however, does not constitute an unconstitutional taking. (See *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at pp. 187-188.) Proposals for affordable housing and housing for seniors, for example, have priority under the growth management ordinance. Therefore, LBE's claim of a regulatory taking, as applied, is not ripe. (*Kinzli v. City of Santa Cruz, supra*, 818 F.2d at pp. 1454-1455.)

LBE cannot take solace in *First English I, supra*, which stated that damages may be available for temporary total takings. In that case, the California courts assumed that a taking had already occurred. (See *First English I, supra*, at p. 311.) Moreover, *First English I, supra*, was expressly limited to its facts. Said the court: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." (*Id.*, at p. 321.) The Supreme Court then remanded the case to the California Supreme Court for further proceedings on the question of whether there had been an unconstitutional taking under the ordinance there in question.

Neither is it " 'clear beyond peradventure . . .' " that the growth management ordinance would result in such excessive delay that it can be assumed that all of the property's beneficial uses have presently been destroyed. (See *Kinzli v. City of Santa Cruz, supra*, 818 F.2d at p. 1454, fn. 5, citing *Norco Construction, Inc. v. King County* (9th Cir. 1986) 801 F.2d 1143, 1145.) The instant temporary ordinance calls for a reevaluation in 1991 of its restrictions, pursuant to the 1990 census and it automatically expires in 1996. Unless a temporary moratorium is total and is unreasonable in purpose, duration or scope, the restrictions it places on development are not compensable. (*First English II, supra*, at pp. 1372-1373.)

In *First English II, supra,* the county enacted a temporary moratorium on building after a flood so that it could conduct a study of the situation. This did not constitute an unconstitutional taking. No taking results when a partial moratorium measure is enacted to protect the public health, safety or morals. (*Id.*, at p. 1362; see

also *Associated Home Builders Etc., Inc. v. City of Livermore, supra,* 18 Cal.3d 582.)

Loss of Substantially All Economic Use

The second prong of the *Agins* taking test is whether the regulations deny the property owner substantially all economically viable use of the land. (*Agins v. Tiburon, supra,* 447 U.S. at p. 260.) The meaning of this concept is elusive, but the general rule is that "the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property." (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra,* 841 F.2d at p. 877, citing cases.)

The denial of the highest and best use does not constitute an unconstitutional taking of the property. (*Macleod v. Santa Clara County* (9th Cir. 1984) 749 F.2d 541, 548.) Even where there is a very substantial diminution in the value of land, there is no taking. (*Id.*, at pp. 547-548, citing *Hadacheck v. Sebastian* (1915) 239 U.S. 394 — diminution in value from $800,000 to $60,000 not a taking; *William C. Haas v. City & Cty. of San Francisco* (9th Cir. 1979) 605 F.2d 1117, 1120 — diminution in value from $2 million to $100,000 not a taking.) The burden of proof is on the applicant, who faces an uphill battle. (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty, supra,* 841 F.2d at p. 877.)

In *MacLeod v. Santa Clara County, supra,* 749 F.2d 541, MacLeod purchased cattle grazing property and found it unprofitable. At one time the county granted him a use permit to harvest hardwood, which he also found to be unprofitable. Then, MacLeod attempted to farm the land, which he found infeasible due to irrigation problems.

He then successfully applied to the state for permission to harvest timber. He entered into a contract to sell harvested timber to a third party. County, citing various public health, safety and welfare concerns, denied him a use permit. MacLeod sued for inverse condemnation.

The court, ruling for the county, found that the denial of the permit application did not interfere with other primary objectives; (1) holding the property for investment purposes, and (2) cattle grazing. (*MacLeod v. Santa Clara County, supra,* 749 F.2d at p. 547.)

In *William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d 1117, the appellant claimed that rezoning and imposition of other land use restrictions so diminished the value of his investment property that it amounted to a taking. The court disagreed.

On June 28, 1971, Haas contracted to purchase a large unimproved parcel of land in San Francisco. The contract was conditioned on the procurement of a valid site permit for his proposed high-rise development project.

As of July 7, 1971, the date of application for the permit, the property was zoned for the proposed use. Nonetheless, the planning commission denied the permit because the project "would have a detrimental effect on the City as a whole and upon the residents and property of the neighborhood." (*William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d at p. 1119.) The city relied on a recent urban design plan developed for inclusion in the city's master plan.

Haas appealed on August 13, 1971. Two weeks later the commission formally adopted the urban design plan. On August 26, 1971, interim height and bulk restrictions were adopted by the commission, and Haas withdrew the application.

On November 9, 1971, Haas submitted a new plan to the commission to comply with the new height and bulk limitations. The commission approved the application for a site permit on the revised plans, and the board of permit appeals denied a petition for rehearing sought by surrounding residents. Haas then bought the land for $1,650,000, plus various fees. He broke ground and commenced construction.

A neighborhood improvement association filed a writ petition on April 20, 1972, on the ground that Haas failed to comply with the California Environmental Quality Acts of 1970 and 1972. Although he prevailed in the trial court, Haas lost on all appeals. The courts held that he did not state a sufficient claim for a vested right despite the site permit, because he had not undertaken "substantial construction" nor had he incurred substantial liabilities. Haas had to start anew.

By then, however, Haas faced "insurmountable barriers" to the proposed project because the planning commission had adopted a 40-foot height restriction, density controls and had rezoned the property. Haas sued to challenge the rezoning and other land use restrictions on constitutional grounds. He contended that the combined impact of these restrictions destroyed the value of his property investment.

The court held that, as a matter of law, he stated no claim for inverse condemnation. His numerous contentions all rested on the premise that the rezoning and the land use restrictions were so grossly disproportionate in their detriment to him, as opposed to the benefits conceivably inured to the public's general welfare, that they constituted a taking. (*William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d at p. 1120.)

The *Haas* court upheld the land use regulations because they were reasonably related to health, safety, morals or general welfare. Such police power regula-

tions are routinely upheld even when they nearly destroy or severely affect recognized real property interest or flatly prohibit the most beneficial use. (*William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d at p. 1120.) Although the standard of reasonable relation is lower than that set forth recently by the Supreme Court in *Agins* and *Nollan*, the purposes of a comprehensive plan to decrease population density, to preserve natural resources, and to promote aesthetics are sufficient to support the restrictions which have been enacted here as a matter of law. (*Id.* at pp. 1120-1121.)

LBE, like Haas, argued it was left with no economically viable use. Even if it were true that LBE's profit may be severely reduced, and we find this assertion speculative, it would fail to meet the test that there be no viable economic use of the property. This rule holds true even if the zoning restrictions preclude recovery of the initial investment made. (*William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d at pp. 1120-1121.)

The restrictions in the growth management ordinance and the open-space zoning designations reveal the availability of beneficial uses upon annexation, such as senior or affordable housing. Although County has downzoned most of the subject property to O-S 160 (open-space designation permitting one residential structure per 160 acres of land), LBE may apply for a zoning variance for permissible 10-acre parcels. (And see *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra,* 841 F.2d at p. 877 — government entities need not show the availability of such uses.)

The availability of variances or of other additional special uses strongly suggests there are other economically beneficial uses not expressly included in such ordinances. (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra,* 841 F.2d at p. 877.)

Reasonable Investment-Backed Expectations

LBE opines that its reasonable investment-backed expectations (RIBE), to profitably build out a subdivision of homes, has been rendered economically infeasible because of delays caused by the laws and the conduct of defendants.

There is considerable controversy whether courts should consider a landowner's profit expectations in an inverse condemnation action. (See *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra,* 841 F.2d at pp. 877-878, esp. fn. 4, citing *Williamson Planning Comm'n v. Hamilton Bank, supra,* 473 U.S. at pp. 190-191, fn. 12; and cf. *Keystone Coal Association v. DeBenedictis* (1987) 480 U.S. 470, 499.)

Although in some cases it may be a legitimate consideration, here LBE has not stated facts which enable it to proceed on this theory.

Although the developer in *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, spent more that $2 million in building infrastructure and had obtained a final map as well as a permit to complete rough grading, the court concluded that its failure to obtain a permit from the coastal commission and obtain final building permits left it without a vested interest upon which it could rely. (P. 793.)

The court so held even though it found that the approvals Avco had previously received led Avco to reasonably expect it would be allowed to build without further discretionary approvals. (*Avco Community Developers, Inc. v. South Coast Regional Com., supra,* 17 Cal.3d at p. 790.) Under *Avco,* one cannot obtain a vested right to build in reliance on "the assurances of city officials that construction . . . was permitted, . . ." or

on spending large sums for preliminary development costs. (*Id.*, at p. 792.)

According to *Avco,* reasonable investment-backed interests depend upon performing substantial work and incurring substantial liabilities based on good faith reliance on the actual issuance of building permits in accord with the laws applicable at the time of their issuance. (*Avco Community Developers, Inc. v. South Coast Regional Com., supra,* 17 Cal.3d at pp. 791-792.)

In *MacDonald, Sommer & Frates v. County of Yolo et al., supra,* 477 U.S. at page 349, the Supreme Court stated that until the landowner has obtained a final decision regarding the application of zoning and subdivision regulations to his property, it is impossible to know whether the land retains any reasonable beneficial use *or whether his reasonable investment-backed expectations have been destroyed.* LBE has not submitted an application for annexation, much less applied for and obtained an actual building permit. (See also *Agins v. Tiburon, supra,* 447 U.S. at p. 262.)

In *MacLeod v. Santa Clara County, supra,* 749 F.2d 541, all three bases of this theory are discussed. On the vested rights theory, the court said that although MacLeod had every reason to believe his application (for a county use permit to harvest timber) would be granted, he "must have been aware that the standards and conditions governing the issuance of the permit might cause his application to be denied." (*Id., at p. 548.*)

On the theory of economic viability, the court said that denial of the permit did not interfere either with holding the property for investment purposes or with the interim, although unprofitable, use of cattle grazing. (*MacLeod v. Santa Clara County, supra,* 749 F.2d at pp. 546-548.) Diminution in expected value, even if that loss is severe, does not constitute a taking. (*Id.*, at p. 548, citing *Hadacheck v. Sebastian, supra,* 239 U.S.

394 — $800,000 investment became worth $60,000; and *William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d at p. 1120 — $2 million investment became worth $100,000.)

As here, the gravemen of MacLeod's contention was that a taking requiring compensation occurred "because he has been denied the opportunity to exploit his property by pursuing a particular project he had come to believe would be available for development. This argument fails." (*MacLeod v. Santa Clara County, supra,* 749 F.2d at p. 548; see esp. *William C. Haas v. City & Cty. of San Francisco, supra,* 605 F.2d at pp. 1120-1121; and also *MacDonald, Sommer & Frates v. County of Yolo et al., supra,* 477 U.S. at p. 347.)

" '[The] [p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. . . .' " (*MacLeod v. Santa Clara County, supra,* 749 F.2d at p. 548, quoting *Andrus v. Allard* (1979) 444 U.S. 51, 66; and see *Hodel v. Virginia Surface Min. & Recl. Assn., supra,* 452 U.S. at pp. 296-297.) Since *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104, the Supreme Court has rejected such arguments as " 'quite simply untenable.' " (*MacLeod, supra,* at p. 548, quoting *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. at p. 130.) The Fifth Amendment "is not a panacea for less-than-perfect investments or business opportunities." (*Id.*, at p. 549.)

Regardless of how we analyze RIBE, we come up with the same conclusion — LBE has not stated facts which support recovery for inverse condemnation as a matter of law.

Due Process

LBE's due process allegations are conclusional, premature and, upon our review of the judicially-noticed legislation, incorrect as a matter of law. (*Kinzli v. City of Santa Cruz, supra,* 818 F.2d at p. 1456, citing the Supreme Court in *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at p. 199.)

Even if a Fifth Amendment takings claim could arguably be recast as one sounding in substantive due process, it would be premature. (*Kinzli v. City of Santa Cruz, supra,* 818 F.2d at p. 1456.) And, there can be no denial of procedural due process, under the Fourteenth Amendment, until the substantive due process claim is ripe. (*Ibid.*)

An ordinance that is reasonably related to the public welfare of the population it significantly affects is constitutional. (*Associated Home Builders Etc., Inc. v. City of Livermore, supra,* 18 Cal.3d at pp. 606-607; also see *McMillan v. Goleta Water Dist.* (9th Cir. 1986) 792 F.2d 1453, 1457.) The Guidelines and the growth management initiative are reasonably related to the public welfare.

Equal Protection

LBE has insufficiently and improperly alleged that defendants have violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. LBE alleged that defendants have arbitrarily set aside its property as open space as opposed to the use allowed owners of other comparable property.

Absent the allegation of the invasion of fundamental rights or the existence of a suspect classification, the right to equal protection is not violated unless the

classification made bears no rational relationship to a legitimate state interest. (*McMillan v. Goleta Water Dist., supra,* 792 F.2d at p. 1456; *Pennell v. San Jose* (1988) 485 U.S. 1, 14, citing *Vance v. Bradley* (1979) 440 U.S. 93.) This is true even if some discrimination is alleged. (*McMillan, supra,* at p. 1456.)

Here, the classification of the land as open space, which was made long before LBE purchased it, is rationally related to the legitimate state interest in preventing urban sprawl and its concomitant effects as outlined in the Guidelines and the growth management ordinance.

The allegation that defendants have treated LBE in a discriminatory manner as opposed to others is too vague. Although LBE's second amended complaint, proffered at the motion for reconsideration, more specifically alleged that owners of other property have been treated more equitably, there are material differences among these projects which render the allegation unsupportable as a matter of law.

In one instance, the development was never approved. In the other instances, sewer and water are being provided to the properties by facilities governed by entities other than the City Council.

The instant property, however, would likely be serviced by the Simi Valley County Sanitation District and the Waterworks District Number 8, both of which are governed by the City Council of Simi Valley. The requirement of annexation is entirely consistent with this situation, as explained in the Guidelines.

Civil Rights

LBE's allegation that it has been deprived of due process, equal protection and just compensation in inverse condemnation under color of state law, pursuant

to title 42 United States Code sections 1983 and 1988, is not ripe because there has been no final decision on meaningful applications. (See *Williamson Planning Comm'n v. Hamilton Bank, supra,* 473 U.S. at pp. 187-188.)

Conspiracy

LBE alleges a conspiracy among the defendants to perform the activities previously alleged. There is no separate cause of action for civil conspiracy apart form overt acts done in furtherance of activities which are legally compensable. (*Widdows v. Koch* (1968) 263 Cal.App.2d 228, 234; and see *Escamilla v. City of Santa Ana* (C.D.Cal. 1985) 606 F.Supp. 928, regarding 42 United States Code section 1983 allegations.) Because we find LBE has not alleged any actionable activities, we hold that there is no actionable conspiracy.

Relief by Writ, Injunction and Declaratory Relief

Because there is no basis in law or equity to grant relief under the facts alleged, there is no ground upon which we can grant relief by way of writ, injunction or declaration.

LBE has sued City and County because of disappointed expectations concerning its development plans. LBE states no cause of action even if it has expended substantial sums on infrastructure and preapproval planning, and even though there will be some delay in bringing some development proposal to fruition. These expenditures and delays are the normal incidents of development projects and are not actionable, per se.

We affirm the judgment as to County.

EXHIBIT B

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 6

Hamilton & Samuels
Karen J. Lee
4000 Macarthur Blvd.
Suite 5700
Newport Beach, CA. 92660

B046558

RE: Simi Valley, City of
VS.
Ventura County Superior Court
Long Beach Equities, Inc.
2 Civil B046558
Ventura No. 103364

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 6 DATE: 04/12/91

Hamilton & Samuels
Karen J. Lee
4000 Macarthur Blvd.
Suite 5700
Newport Beach, CA. 92660

RE: Long Beach Equities, Inc.
VS.
Ventura, County of

2 Civil B045047
Ventura No 103364

THE COURT:

THE PETITION FOR REHEARING IS GRANTED

EXHIBIT C

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

COURT OF APPEAL-SECOND DIST.
FILED
JUN 27 1991
ROBERT N. WILSON, Clerk

Deputy Clerk

LONG BEACH EQUITIES, INC., etc.,
Plaintiff and Appellant,
v.
COUNTY OF VENTURA, et al.,
Defendants and Respondents.

2d Civil No. B045047
(Super. Ct. No. 103364)
(Ventura County)

THE CITY OF SIMI VALLEY, et al.
Petitioners,
v.
SUPERIOR COURT OF THE
COUNTY OF VENTURA,
Respondent.

LONG BEACH EQUITIES, INC., et al.,
Real Parties in Interest.

No. B046558

OPINION ON REHEARING

Long Beach Equities, Inc. (LBE) desires to build 249 single-family residences on a 250-acre parcel of land it owns adjacent to the City of Simi Valley (City). LBE contends that land use regulations of the County of Ventura (County) and City, on their face and as applied, will so greatly delay its development plans as to render them economically infeasible.

We hold that this suit is not ripe for adjudication. We affirm the judgment for County and grant City's petition for issuance of a writ of mandate to compel the trial court to enter an order sustaining City's demurrer without leave to amend.

LBE sued these entities seeking damages for inverse condemnation, among other things.[1] The trial court sustained County's demurrer to LBE's first amended complaint without leave to amend. LBE moved for reconsideration and proffered a second amended complaint. The court denied the motion and sustained City's demurrer without leave as to several counts, but overruled that demurrer on counts for inverse condemnation, denial of due process and declaratory and injunctive relief.

LBE appealed the judgment entered on County's demurrer and the ruling rendered on its motion for reconsideration. City filed a petition for a writ of mandate to compel the trial court to vacate its order overruling the demurrer. We have consolidated these actions on appeal in the interest of judicial economy and

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[1] Complainant Marr Ranch Associates is not a party to this appeal. Also, LBE has sued the County Board of Supervisors, the Ventura Planning Commission and the Simi Valley City Council. We shall refer to all County and City defendants as County and City, respectively.

to aid in the resolution of this lawsuit. (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1272; see 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 62, pp. 86-87, § 64, pp. 88-89, § 65, pp. 89-90.)

STANDARDS OF REVIEW

LBE has the burden to prove that the trial court abused its discretion in sustaining County's demurrer without leave to amend. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) The City has the burden to show that the trial court's order is erroneous as a matter of law and that it will suffer harm which cannot be corrected on further appeal. (*Omaha Indemnity Co. v. Superior Court, supra,* 209 Cal.App.3d at pp. 1273-1274.)

We must construe the allegations of LBE's voluminous complaint liberally to attain substantial justice among the parties. (Code Civ. Proc., § 452.) We deem true all material and properly pleaded facts. (*Pan Pacific Properties, Inc. v. County of Santa Cruz* (1978) 81 Cal.App.3d 244, 251.) We also consider all documents which have been determined by the trial court as appropriate for judicial notice, many of which are mentioned in the complaint. (Code Civ. Proc., § 430.30; *First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1368.)[2] They include resolutions, reports and other official acts of County and City. (*Pan Pacific, supra,* at p. 255, fn. 2.)

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[2] The California Court of Appeal heard *First English Evangelical Lutheran Church v. County of Los Angeles, supra,* 210 Cal.App.3d 1353 (hereinafter cited as *First English II*) on remand from the United States Supreme Court in *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304 (hereinafter cited as *First English I*).

We may not consider conclusions of fact or law, opinions, speculation or allegations which are contrary either to law or to judicially-noticed facts. (See *Pan Pacific Properties, Inc. v. County of Santa Cruz, supra,* 81 Cal.App.3d at pp. 251, 255, fn. 2; *Agins v. Tiburon* (1980) 447 U.S. 255, 259, fn. 6.)

The Complaint — The Facts

On June 25, 1969, the Ventura County Planning Commission first adopted Guidelines for Orderly Urban Development (Guidelines). The Guidelines provide policies, standards and criteria to evaluate applications for zone changes from rural to urban land use classifications and for "related land use development matters."

The Guidelines initially were adopted to assure the "efficient provision of urban services and sound urban land use planning" and to avoid "the problems and costs associated with urban sprawl" through coordinated planning with other local government entities.

Those Guidelines provided that urban growth of developing communities in Ventura County should proceed in a compact and logically expanding form which includes satisfactory permanent open space areas within physically developed land.

The revised Guidelines of 1976 and 1985 continued the theme that urban development should occur within existing, incorporated cities because cities provide a full range of municipal services. County removed the language regarding retention of permanent open space within developed land in its revised Guidelines.

According to the Guidelines, land uses which would be allowed by County should be equal to or more restrictive than those uses allowed by City within a city's

sphere of influence. Before new urban development proceeds, the land should be annexed to City to ensure that the full range of urban services are provided by municipalities. Within "areas of interest" to a City, as here, such development should be allowed only within existing communities.

The Ventura County General Plan, with its discussion of stages of development, may be used as a tool to evaluate proposals for urban development.

As of 1980, City's General Plan designated the subject area for residential development of a maximum of 1,100 units and for a shopping center. On September 15, 1981, County's Open Space Plan designated the subject property as having an "Urban Reserve overlay." This overlay contemplates residential development, but it encourages developers to deal directly with the appropriate city to proceed. County also adopted City's General Plan as the Simi Valley Area Plan (the SVAP) portion of the County's General Plan.

LBE alleges that in adopting the SVAP, the County expressly recognized that the property should be developed with urban uses in the densities stated in the text because: (1) the SVAP showed that over 80 percent of the area's valley floor had already been developed; (2) private and public utility and sewer infrastructure had been extended to meet the needs of the development and is more than adequate to provide service at comfortable levels of safety, adequacy and efficiency; (3) development at the density designated is necessary to meet the residential housing needs of the area and to fulfill the County's regional housing obligations; (4) the County recognized the City's desire that the property be developed as shown in the City's General Plan.

In 1984 LBE purchased the subject 250 acres of land located in unincorporated territory adjacent to and within the "areas of interest" of City.[3]

LBE alleges that before it purchased the property, the City agreed that if LBE submitted a specific plan for 1,100 units, it would be approved. Pursuant to City's request, LBE prepared such a specific plan. It paid all fees for that plan and for an environmental impact report (EIR) on the plan.

The City Council then became the applicant for the specific plan which provided for development of 1,730 units. To accommodate new grading ordinances, the specific plan and a proposed General Plan amendment were modified to reduce the number of units to 1,059 and to eliminate the shopping center.

LBE helped to pay for oversized infrastructure adjacent to its property which could service the development project at the density set forth above. LBE shared in engineering costs for easements it granted. All necessary infrastructure and public services for the projected residents of the property are now in place. LBE asserts that the property could be serviced by county service districts.

In late 1985, City passed an urgency interim ordinance. The ordinance imposed a partial moratorium on providing approval for various land use permits, particularly in hillside areas, until City could review and revise its General Plan. City enacted the ordinance after it monitored development and land use trends in the community. It realized that various land uses then permitted might conflict with proposed revisions to its General Plan. City wanted to consider those uses "in an

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[3] Marr Ranch Associates purchased approximately 2,500 acres in the same area.

atmosphere of land use stability . . . ." LBE alleges that the ordinance "effectively imposed a moratorium on all processing of major new projects" including its own project, "until the City could review and revise its General Plan."

In July 1986, City adopted a temporary growth management plan which would severely limit the number of building permits to be issued annually. The plan takes note of population trends and includes provisions for reevaluation in 1991 based on facts obtained from the 1990 census. Those facts are to be considered in relation to the criteria set forth in the measure, in the revised General Plan and in the County population guidelines. The plan is effective until January 1, 1996.

The plan requires that a developer obtain approval of its proposed project from City, among others, to become eligible for a waiting list to apply for building permits.

The revised City General Plan, adopted in October 1988, designated approximately 325 units for LBE's property. LBE then prepared, but did not file, a tentative map for 249 single family residences to meet the new design criteria of City and County.

City now requires that another specific plan on the entire property be prepared. LBE alleges that this requirement is illegal, and on information and belief alleges that it would take up to 10 years to proceed with the proposed 249-unit development. LBE would be required to complete a specific plan and an EIR, process other required land use applications and get in line to compete with other development applicants for available building permits.

LBE asserts that "[t]he inescapable fate of delay" is clear and that its tremendous carrying costs cannot be overcome. It alleges that its property would diminish in value until it is worth nothing.

Because it "recognized" the "impossibility of developing within the City's jurisdiction, . . ." LBE turned to the County which "foreclosed all development of the Property whatsoever.'

County amended its General Plan on May 24, 1988, allegedly to foreclose LBE's development project. County downzoned much of the property to OS-160 (open space zoning which allows one unit per 160 acres).

Around August 1988, County would not let LBE make application to process the project through County. County told LBE it must first apply for a General Plan amendment and promote the adoption of a new area plan for Simi Valley. LBE alleges it was told that it would take two to three years to adopt a new area plan.

LBE began to seek a General Plan amendment to amend the County General Plan for development of the 250-acre parcel. The County Board of Supervisors considered LBE's prescreening application on January 17, 1989, and denied it, stating that any development of the proposed project must occur in the City after annexation.

The Complaint — The Theory

LBE recites the foregoing allegations to support its seven causes of action. The first is for inverse condemnation. LBE states that City and County's actions in rescinding the area plan, forbidding all development in the urban reserve overlay, downzoning the property, imposing a de facto or actual moratorium (on development) and imposing a growth-control plan to preclude large scale residential development has resulted in a de facto taking in violation of article I, sections 7 and 19 of

the California Constitution and of the Fifth and Fourteenth Amendments to the United States Constitution.

LBE alleges that these actions deprive the subject property of substantially all its value, renders it unmarketable and forbids substantially all reasonable economic beneficial use of the property, thereby thwarting its reasonable investment-backed expectations.

The second cause of action is for denial of substantive and procedural due process. LBE asserts that the defendants have restricted the use of its property to to open space without a legitimate purpose and without evidence to support such action.

The third cause of action alleges denial of equal protection because defendants have limited the use of LBE's property to open space in contrast to uses allowed the owners of comparable properties in the County.

The fourth cause of action seeks relief for deprivation of civil rights under 42 United States Code sections 1983 and 1988. LBE alleges that defendants knowingly and wrongfully deprived it of due process, equal protection and just compensation under the California and federal constitutions under color of state law.

The fifth cause of action is captioned conspiracy to deprive plaintiffs of civil rights. It realleges the various actions of City and County as a pattern of conduct intended to deprive LBE of its legal rights under color of state law.

The sixth cause of action seeks declaratory and injunctive relief as to the rights, duties and obligations among the parties regarding the various actions alleged in the complaint.

Lastly, LBE seeks a writ of mandate under Code of Civil Procedure section 1085 for abuse of discretion by County in acting in the manner described above.

LBE alleges that the City and County have imposed "an ever changing series of obstacles on the development of the Property," and have therefore made "development of the Property a practical impossibility . . . ." Further, LBE alleges it "exhausted all reasonable administrative remedies," and "[f]urther attempts to secure relief through administrative procedures . . . would be totally impractical and futile."

DISCUSSION

To state a cause of action for inverse condemnation, LBE must plead facts which show either that: (1) the application of the general zoning laws to its property does not substantially advance a legitimate state interest; or (2) such laws deprive it of substantially all economically viable use of its land. (*Agins v. Tiburon, supra,* 447 U.S. at p. 260; also see *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, which refined the first prong of the *Agins* test to require that the regulation advance the precise state interest which avowedly motivated it.)

No precise rule exists to determine when property has been taken by inverse condemnation. (*Agins v. Tiburon, supra,* 447 U.S. at pp. 260-261; *MacDonald, Sommer & Frates v. County of Yolo et al.* (1986) 477 U.S. 340, 348-349.) We start with the proposition that government regulations are presumed to be motivated by and to reasonably serve their avowed purposed. (*First English II, supra,* at p. 1372.) We then weigh the private interest asserted against the public's interest as shown in enactments passed in the exercise of the state's police powers. Where the public benefits greatly, it is constitutional to restrict the use of one's land. (*Id.*, at pp. 1366-1367, fn. 10.) In some cases, no compensation may be required even if almost all uses are taken. (*Id.*, at p. 1366.)

Facial Attack on Legislation

Local government legislation is constitutional on its face if it bears "a substantial relationship to the public welfare . . ." and inflicts no irreparable injury on the landowner. (*Agins v. Tiburon, supra,* 447 U.S. at p. 261; *Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365, 395-397.) This is true even where a substantial diminution in value of the property is alleged. (*Agins, supra,* at p. 261.)

Both County's Guidelines and City's Growth Management Ordinance satisfy this test. The County enacted the Guidelines to promote efficient and effective delivery of community services and to conserve the resources of County by encouraging urban development to occur within cities. The Guidelines emphasize annexation as a means to accomplish these purposes.

City enacted its ordinance "to protect the unique, hill-surrounded environment; enhance the quality of life; promote public health, safety or welfare and the general well-being of the community . . . ." By limiting the rate, distribution, quality and type of residential development on an annual basis, with periodic reviews of the ongoing situation, City seeks "to improve local air quality, reduce traffic demands . . . and ensure that future demands for such essential services as water, sewers and the like are met . . . ."

Courts have long recognized the legitimacy of such ordinances, because such laws are designed to protect the public weal. (See *Agins v. Tiburon, supra,* 447 U.S. at pp. 261-262, citing *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 129; *Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 9; *Euclid v. Ambler Realty Co., supra,* 272 U.S. at pp. 394-395.) Courts will not interfere with a municipality's determination of

policy. (*Associated Home Builders Etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 605.)

LBE argues that County and City's actions are designed to thwart LBE's project and that they are contrary to Government Code provisions which support the development of housing, citing Government Code sections 65583, 65580, and 65581. Although these sections promote the development of residential housing, such development is not encouraged when it fails to conserve needed open space and contributes to urban sprawl. (See Gov. Code, § 65560, et seq.)

The state also seeks to assure that open space is conserved wherever possible through open space plans. (Gov. Code, § 65562.) A " '[l]ocal open-space plan' is the open-space element of a county or city general plan . . . ." (Gov. Code, § 65560, subd. (a).) Government Code section 65560, subdivision (b) states that open space is defined to mean, inter alia, "any parcel or area of land . . . essentially unimproved and devoted to an open-space use as defined in this section, and which is designated on a local [or] regional . . . open-space plan as any of the following: . . . (4) Open space for public health and safety, including, but not limited to, areas . . . required for the protection of water quality and . . . areas required for the protection and enhancement of air quality."

The Guidelines and the Growth Management Ordinance express local legislative determinations: 1. to assure that land continues to be available for the use of natural resources (Gov. Code, § 65561, subd. (a)); 2. to discourage premature and unnecessary conversion of open-space land to urban uses and to discourage noncontiguous development patterns (§ 65561, subd. (b)), even though this project is contiguous to developed land; and 3. to preserve valuable open space land by adoption and

strict administration of such ordinances or by other appropriate means (§ 65561, subd. (c)).

The Guidelines substantially advance these goals by encouraging urban development only within cities to asure the efficient and effective delivery of a full range of municipal services. Although the Growth Management Ordinance expressly acknowledges the need for new jobs, improved shopping facilities and housing opportunities for all the residents of the community, it also recognizes the need to limit growth to preserve water and air quality. (See Gov. Code, § 65560, subd. (b)(4).) Such legislative action is well designed to prevent the ill effects of poorly planned urbanization. (*Agins v. Tiburon, supra,* 447 U.S. at p. 261; *First English II, supra,* at p. 1370.)

LBE's allegations state that as of 1980 the City's General Plan slated a portion of the subject property for residential development. LBE also alleged that as of September 1981, the County adopted the City's General Plan as the SVAP which recognized that the property should be developed for urban uses.

That County and City have projected residential and other urban uses for the area in their General Plans does not entitle LBE to develop its land. (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 795-796; *MacLeod v. Santa Clara County* (9th Cir. 1984) 749 F.2d 541, 548.) The Guidelines and the Growth Management Ordinance provide substantial, legitimate bases for the protection of the public welfare regarding such development. We may not interfere with such policy. (*Associated Home Builders Etc., Inc. v. City of Livermore, supra,* 18 Cal.3d at pp. 604-605.)

LBE acknowledged in its complaint that County's Land Use Plan imposed an urban reserve overlay which encourages developers to deal directly with City so that such development is placed within incorporated cities

whenever and wherever possible, as stated in the Guidelines. The open-space plan maps show this urban reserve overlay as of September 15, 1981.

Ripeness of Attack on Legislation as Applied

An attack on regulatory legislation as applied to a particular parcel of property is not ripe for adjudication in inverse condemnation unless the plaintiff shows that: (1) the regulation has gone so far that it has accomplished a taking, and (2) compensation tendered is not just. (*MacDonald, Sommer & Frates v. County of Yolo et al., supra*, 477 U.S. at p. 348; *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty.* (9th Cir. 1987) 841 F.2d 872, 876.)

LBE bears a heavy burden to show that its "as applied" attack is ripe. LBE must first show that City and County have made a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." (*MacDonald, Sommer & Frates v. County of Yolo et al., supra*, 477 U.S. at p. 348.) "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." (*Ibid.*)

The developer must establish that it has submitted at least one meaningful application for a development project which has been thoroughly rejected, and that it has prosecuted at least one meaningful application for a zoning variance, or something similar, which has been finally denied. (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at pp. 876-877; see also *Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 187-188; *Kinzli v. City of Santa Cruz* (9th Cir. 1987) 818 F.2d 1449, 1454, as amended at 830 F.2d 968.) Informal or tentative development proposals are

insufficient to meet these tests. (*Lake Nacimiento, supra*, at p. 876.)

The test is *not* one of exhaustion of a particular administrative remedy — whether the developer has exhausted all administrative appeals regarding a particular application. The developer must show that it has submitted the appropriate applications necessary to proceed with the particular project and that it has received a final rejection of those applications. (*Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at pp. 186-190; *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at pp. 876-877.)

The case of *Kinzli v. City of Santa Cruz, supra*, 818 F.2d 1449, a case similar to the instant one, illustrates how these rules apply.

The Kinzli family owned land adjacent to the City of Santa Cruz for many years. Gradually the property became surrounded by urban development.

Through a stipulated judgment in eminent domain, the city successfully obtained four acres of the property for construction of a public street. The city promised the Kinzlis that they could develop the property with high density uses once the road was built. The city never built the road.

In 1979, the voters passed a slow growth initiative which limited the use of the property to open space until 1990. The measure precluded the city from providing certain urban services in the area in which the property was located.

The city enacted a green belt overlay ordinance to implement the initiative. The ordinance set out the requirements to obtain special use permits and the conditions for extensions of urban services to the greenbelt area. Limited single family and accessory structures could be built upon application for special permits.

High density development, formerly available and sought by the Kinzlis, was forbidden.

The Kinzlis tried to sell the property on the condition that residential building permits could be obtained. One potential buyer abandoned an application he filed on behalf of the Kinzlis because a government staff engineer told him that the city could not provide water to the property. The Kinzlis did not submit applications for other uses.

In 1980, the Kinzlis sued the city charging that the ordinance, and the city's conduct regarding the condemnation proceedings, violated federal constitutional and civil rights and rights under California laws.

At trial, the court discussed the merits of the taking claim and denied it. The appellate court found that the the trial court erred in discussing the merits because the claim was not ripe. Because the Kinzlis had not submitted a "meaningful" development plan or an application for a variance, the appellate court held that the claim should have been dismissed. (See *Kinzli v. City of Santa Cruz, supra*, 818 F.2d at p. 1455.)

Failure to avail oneself of administrative solutions, which might obviate the need to consider constitutional questions, renders a claim for inverse condemnation unripe for adjudication. (*Hodel v. Virginia Surface Min. & Recl. Assn.* (1981) 452 U.S. 264, 297.)

In *MacDonald, Sommer & Frates v. County of Yolo et al., supra*, 477 U.S. 340, the Supreme Court rejected as unripe allegations that a city and county unconstitutionally restricted use of its property to open space when it denied a tentative subdivision tract map to build 159 single and multiple family homes. (Pp. 344, 352, fn. 8.) There, as here, the plaintiff urged that any application for a zone change, a variance or other relief would be futile. Its allegations that all principal and accessory

uses were no longer permitted and that its property had no value were rejected as speculative and conclusional. (*Id.*, at pp. 345, 351, citing *San Diego Gas & Electric Co. v. San Diego* (1981) 450 U.S. 621, 631-632, fn. 12; and *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at pp. 187-188.)

Denial of approvals for a particular and relatively intensive residential development, as here, cannot be equated with a refusal to permit any beneficial use whatsoever. (*MacDonald, Sommer & Frates v. County of Yolo et al., supra*, 477 U.S. at p. 347.)

In the instant case, LBE has not submitted an application for annexation to City even though the Guidelines, since 1969, have urged developers who propose projects like this one to do so. LBE did not follow through on its application for a tentative tract map, nor has LBE alleged that it applied for a zoning change, or sought other favored uses such as senior and affordable housing.

Nevertheless, LBE contends that County has foreclosed all development of its property within County. LBE relies on the following passage from the amended General Plan:

"The Urban Reserve overlay designation is applied to all unincorporated land within a city's adopted Sphere of Influence. Although LAFCO has determined these areas to be appropriate for eventual annexation and urbanization, the Urban designation was not applied to all lands within the LAFCO sphere boundaries because it could result in uban development being permitted without annexation. Accordingly, unincorporated lands within spheres have been designated under this General Plan either as Existing Community, Rural, Agricultural or Open Space. Under these designations, therefore, more intense development could not occur on affected lands until they are annexed."

This language does not foreclose all development, but merely restates County's position since 1969 on annexation. City's Growth Management Ordinance is also a temporary, partial moratorium on certain kinds of development.

If LBE successfully applied for annexation, it could explore other possibilities for development under the Growth Management Ordinance. These possibilities may not reflect what LBE desires to build. This, however, does not constitute an unconstitutional taking. (See *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at pp. 187-188.)

LBE cannot take solace in *First English I, supra*, which stated that damages may be available for temporary total takings. In that case, the California courts assumed that a taking had already occurred. (See *First English I, supra*, at p. 311.) Moreover, *First English I, supra*, was expressly limited to its facts. Said the court: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." (*Id.*, at p. 321.) The Supreme Court then remanded the case to the California Supreme Court for further proceedings on the question of whether there had been an unconstitutional taking under the ordinance there in question.

Neither is it " 'clear beyond peradventure . . .' " that the Growth Management Ordinance would result in such excessive delay that it can be assumed that all of the property's beneficial uses have presently been destroyed. (See *Kinzli v. City of Santa Cruz, supra*, 818 F.2d at p. 1454, fn. 5, citing *Norco Construction, Inc. v. King County* (9th Cir. 1986) 801 F.2d 1143, 1145.) The instant temporary ordinance calls for a reevaluation in 1991 of its restrictions, pursuant to the 1990 census and

it automatically expires in 1996. Unless a temporary moratorium is total and is unreasonable in purpose duration or scope, the restrictions it places on development are not compensable. (*First English II, supra*, at pp. 1372-1373.)

In *First English II, supra*, the county enacted a temporary moratorium on building after a flood so that it could conduct a study of the situation. This did not constitute an unconstitutional taking. No taking results when a partial moratorium measure is enacted to protect the public health, safety or morals. (*Id.*, at p. 1362; see also *Associated Home Builders Etc., Inc. v. City of Livermore, supra*, 18 Cal.3d 582.)

Loss of Substantially All Economic Use

The second prong of the *Agins* taking test is whether the regulations deny the property owner substantially all economically viable use of the land. (*Agins v. Tiburon, supra*, 447 U.S. at p. 260.) The meaning of this concept is elusive, but the general rule is that "the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property." (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at p. 877, citing cases.)

The denial of the highest and best use does not constitute an unconstitutional taking of the property. (*MacLeod v. Santa Clara County, supra*, 749 F.2d at p. 548.) Even where there is a very substantial diminution in the value of land, there is no taking. (*Id.*, at pp. 547-548, citing *Hadacheck v. Sebastian* (1915) 239 U.S. 394 — diminution in value from $800,000 to $60,000 not a taking; *William C. Haas v. City & Cty. of San Francisco* (9th Cir. 1979) 605 F.2d 1117, 1120 — diminution in value from $2 million to $100,000 not a

taking.) The burden of proof is on the applicant, who faces an uphill battle. (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at p. 877.)

In *MacLeod v. Santa Clara County, supra*, 749 F.2d 541, MacLeod purchased cattle grazing property and found it unprofitable. At one time the county granted him a use permit to harvest hardwood, which he also found to be unprofitable. Then, MacLeod attempted to farm the land, which he found infeasible due to irrigation problems.

He then successfully applied to the state for permission to harvest timber. He entered into a contract to sell harvested timber to a third party. County, citing various public health, safety and welfare concerns, denied him a use permit. MacLeod sued for inverse condemnation.

The court, ruling for the county, found that the denial of the permit application did not interfere with other primary objectives: (1) holding the property for investment purposes, and (2) cattle grazing. (*MacLeod v. Santa Clara County, supra*, 749 F.2d at p. 547.)

In *William C. Haas v. City & Cty. of San Francisco, supra*, 605 F.2d 1117, the appellant claimed that rezoning and imposition of other land use restrictions so diminished the value of his investment property that it amounted to a taking. The court disagreed.

On June 28, 1971, Haas contracted to purchase a large unimproved parcel of land in San Francisco. The contract was conditioned on the procurement of a valid site permit for his proposed high-rise development project.

As of July 7, 1971, the date of application for the permit, the property was zoned for the proposed use. Nonetheless, the planning commission denied the permit because the project "would have a detrimental effect on the City as a whole and upon the residents and property of the neighborhood." (*William C. Haas v. City & Cty.*

of San Francisco, supra, 605 F.2d at p. 1119.) The city relied on a recent urban design plan developed for inclusion in the city's master plan.

Haas appealed on August 13, 1971. Two weeks later the commission formally adopted the urban design plan. On August 26, 1971, interim height and bulk restrictions were adopted by the commission, and Haas withdrew the application.

On November 9, 1971, Haas submitted a new plan to the commission to comply with the new height and bulk limitations. The commission approved the application for a site permit on the revised plans, and the board of permit appeals denied a petition for rehearing sought by surrounding residents. Haas then bought the land for $1,650,000, plus various fees. He broke ground and commenced construction.

A neighborhood improvement association filed a writ petition on April 20, 1972, on the ground that Haas failed to comply with the California Environmental Quality Acts of 1970 and 1972. Although he prevailed in the trial court, Haas lost on all appeals. The courts held that he did not state a sufficient claim for a vested right despite the site permit, because he had not undertaken "substantial construction" nor had he incurred substantial liabilities. Haas had to start anew.

By then, however, Haas faced "insurmountable barriers" to the proposed project because the planning commission had adopted a 40-foot height restriction, density controls and had rezoned the property. Haas sued to challenge the rezoning and other land use restrictions on constitutional grounds. He contended that the combined impact of these restrictions destroyed the value of his property investment.

The court held that, as a matter of law, he stated no claim for inverse condemnation. His numerous contentions all rested on the premise that the rezoning and the land use restrictions were so grossly disproportionate in their detriment to him, as opposed to the benefits conceivably inured to the public's general welfare, that they constituted a taking. (*William C. Haas v. City & Cty. of San Francisco, supra*, 605 F.2d at p. 1120.)

The *Haas* court upheld the land use regulations because they were reasonably related to health, safety, morals or general welfare. Such police power regulations are routinely upheld even when they nearly destroy or severely affect recognized real property interests or flatly prohibit the most beneficial use. (*William C. Haas v. City & Cty. of San Francisco, supra*, 605 F.2d at p. 1120.) Although the standard of reasonable relation is lower than that set forth recently by the Supreme Court in *Agins* and *Nollan*, the purposes of a comprehensive plan to decrease population density, to preserve natural resources, and to promote aesthetics are sufficient to support the restrictions which have been enacted here as a matter of law. (*Id.*, at pp. 1120-1121.)

LBE, like Haas, argued it was left with no economically viable use. Even if it were true that LBE's profit may be severely reduced, it would fail to meet the test that there be no viable economic use of the property. This rule holds true even if the zoning restrictions preclude recovery of the initial investment made. (*William C. Haas v. City & Cty. of San Francisco, supra*, 605 F.2d at pp. 1120-1121.)

The restrictions in the Growth Management Ordinance and the open-space zoning designations do not rule out development upon annexation. Although County has downzoned most of the subject property to OS-160 (open-space designation permitting one residential structure per 160 acres of land), LBE may apply for

a zoning change for permissible 10-acre parcels. (And see *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at p. 877 — government entities need not show the availability of such uses.)

The possibility of obtaining a zoning change or applying for other additional special uses strongly suggests there are other economically beneficial uses not expressly included in such ordinances. (*Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at p. 877.)

Reasonable Investment-Backed Expectations

LBE opines that its reasonable investment-backed expectations (RIBE), to profitably build out a subdivision of homes, has been rendered economically infeasible because of delays caused by the laws and the conduct of defendants.

There is considerable controversy whether courts should consider a landowner's profit expectations in an inverse condemnation action. (See *Lake Nacimiento Ranch Co. v. San Luis Obispo Cty., supra*, 841 F.2d at pp. 877-878, esp. fn. 4, citing *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at pp. 190-191, fn. 12; and cf. *Keystone Coal Association v. DeBenedictis* (1987) 480 U.S. 470, 499.)

Although in some cases it may be a legitimate consideration, here LBE has not stated facts which enable it to proceed on this theory.

Although the developer in *Avco Community Developers, Inc. v. South Coast Regional Com., supra*, 17 Cal.3d 785, spent more than $2 million in building infrastructure and had obtained a final map as well as a permit to complete rough grading, the court concluded that its failure to obtain a permit from the coastal

commission and obtain final building permits left it without a vested interest upon which it could rely. (P. 793.)

The court so held even though it found that the approvals Avco has previously received led Avco to reasonably expect it would be allowed to build without further discretionary approvals. (*Avco Community Developers, Inc. v. South Coast Regional Com., supra,* 17 Cal.3d at p. 790.) Under *Avco,* one cannot obtain a vested right to build in reliance to "the assurances of city officials that construction . . . was permitted, . . ." or on spending large sums for preliminary development costs. (*Id.,* at pp. 792-793.)

In *MacDonald, Sommer & Frates v. County of Yolo et al., supra,* 477 U.S. at page 349, the Supreme Court stated that until the landowner has obtained a final decision regarding the application of zoning and subdivision regulations to his property, it is impossible to know whether the land retains any reasonable beneficial use *or whether his reasonable investment-backed expectations have been destroyed.* LBE has not submitted an application for annexation, much less applied for and obtained an actual building permit. (See also *Agins v. Tiburon, supra,* 447 U.S. at p. 262.)

In *MacLeod v. Santa Clara County, supra,* 749 F.2d 541, the concept of reasonable investment-backed expectations is discussed in conjunction with the *Agins* prongs of vested rights and economic viability. As to the vested rights theory, the court said that although MacLeod had every reason to believe his application (for a county use permit to harvest timber) would be granted, he "must have been aware that the standards and conditions governing the issuance of the permit might cause his application to be denied." (*Id.,* at p. 548.)

On the theory of economic viability, the court said that denial of the permit did not interfere either with holding the property for investment purposes or with the interim, although unprofitable, use of cattle grazing. (*MacLeod v. Santa Clara County, supra*, 749 F.2d at pp. 546-548.) Diminution in expected value, even if that loss is severe, does not constitute a taking. (*Id.*, at p. 548, citing *Hadacheck v. Sebastian, supra*, 239 U.S. 394 — $800,000 investment became worth $60,000; and *William C. Haas v. City & Cty. of San Francisco, supra*, 605 F.2d at p. 1120 — $2 million investment became worth $100,000.)

As here, the gravamen of MacLeod's contention was that a taking requiring compensation occurred "because he has been denied the opportunity to exploit his property by pursuing particular project he had come to believe would be available for development. This argument fails." (*MacLeod v. Santa Clara County, supra*, 749 F.2d at p. 548; see esp. *William C. Haas v. City & Cty. of San Francisco, supra*, 605 F.2d at pp. 1120-1121; and also *MacDonald, Sommer & Frates v. County of Yolo et al., supra*, 477 U.S. at p. 347.)

" '[The] [p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. . . .' " (*MacLeod v. Santa Clara County, supra*, 749 F.2d at p. 548, quoting *Andrus v. Allard* (1979) 444 U.S. 51, 66; and see *Hodel v. Virginia Surface Min. & Recl. Assn., supra*, 452 U.S. at pp. 296-297.) Since *Penn Central Transp. Co. v. New York City, supra*, 438 U.S. 104, the Supreme Court has rejected such arguments as " 'quite simply untenable.' " (*MacLeod, supra*, at p. 548, quoting *Penn Central, supra*, at p. 130.) The Fifth Amendment "is not a panacea for less-than-perfect investment or business opportunities." (*Id.*, at p. 549.)

Regardless of how we analyze RIBE, we come up with the same conclusion — LBE has not stated facts which support recovery for inverse condemnation as a matter of law.

Due Process

LBE's due process allegations are conclusional and premature. (*Kinzli v. City of Santa Cruz, supra*, 818 F.2d at p. 1456, citing the Supreme Court in *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at p. 199.)

Even if a Fifth Amendment takings claim could arguably be recast as one sounding in substantive due process, it would be premature. (*Kinzli v. City of Santa Cruz, supra*, 818 F.2d at p. 1456.) And, there can be no denial of procedural due process, under the Fourteenth Amendment, until the substantive due process claim is ripe. (*Ibid.*)

An ordinance that is reasonable related to the public welfare of the population it significantly affects is constitutional. (*Associated Home Builders Etc., Inc. v. City of Livermore, supra*, 18 Cal.3d at pp. 606-607; also see *McMillan v. Goleta Water Dist.* (9th Cir. 1986) 792 F.2d 1453, 1457.) The Guidelines and the Growth Management Ordinance are reasonably related to the public welfare.

Equal Protection

LBE alleges that defendants have arbitrarily set aside its property as open space, whereas comparable property in the County has not been similarly restricted.

Absent the allegation of the invasion of fundamental rights or the existence of a suspect classification, there is no violation of equal protection unless the classification bears no rational relationship to a legitimate state interest. (*McMillan v. Goleta Water Dist., supra*, 792 F.2d at p. 1456; *Pennell v. San Jose* (1988) 485 U.S. 1, 14, citing *Vance v. Bradley* (1979) 440 U.S. 93.) This is true even if some discrimination is alleged. (*McMillan, supra*, at p. 1456.)

As with the due process cause of action, the claim here is not ripe. LBE's second amended complaint, proffered as a motion for reconsideration, provided more specific allegations concerning owners of other property who have allegedly been treated more equitably. Even if the trial court had allowed the second amended complaint to be filed, it would still be subject to demurrer absent LBE's filing a proper application.

Civil Rights

LBE's allegation that it has been deprived of due process, equal protection and just compensation in inverse condemnation under color of state law, pursuant to title 42 United States Code sections 1983 and 1988, is not ripe because there has been no final decision on meaningful applications. (See *Williamson Planning Comm'n v. Hamilton Bank, supra*, 473 U.S. at pp. 187-188.)

Conspiracy

LBE alleges a conspiracy among the defendants to perform the activities previously alleged. There is no separate cause of action for civil conspiracy apart from overt acts done in furtherance of activities which are legally compensable. (*Widdows v. Koch* (1968) 263 Cal.App.2d 228, 234; and see *Escamilla v. City of Santa Ana* (C.D.Cal. 1985) 606 F.Supp. 928, regarding 42 U.S.C. §1983 allegations.) Because we find LBE has not alleged any actionable activities, we hold that there is no actionable conspiracy.

Relief by Writ, Injunction and Declaratory Relief

Because there is no basis in law or equity to grant relief under the facts alleged, there is no ground upon which we can grant relief by way of writ, injunction or declaration.

LBE has sued City and County because of disappointed expectations concerning its development plans. LBE states no cause of action even if it has expended substantial sums on infrastructure and preapproval planning, and even though there will be some delay in bringing some development proposal to fruition. These expenditures and delays are the normal incidents of development projects and are not actionable, per se.

We affirm the judgment as to County.

As to City's petition, let a writ of mandate issue to compel the trial court to enter a new and different order sustaining City's demurrer in its entirety without leave to amend. Costs to City and County.

CERTIFIED FOR PUBLICATION

GILBERT, Acting P.J.

We concur:

YEGAN, J.

ABBE, J.*

* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

Bruce A. Thompson, Judge
Superior Court County of Ventura

Hamilton & Samuels and Paul R. Hamilton, Karen J. Lee and Deborah M. Rosenthal, for Plaintiff, Appellant and Real Party in Interest Long Beach Equities, Inc.

James L. McBride, County Counsel, Dennis L. Slivinski, Assistant County Counsel, for Defendant and Respondent, County of Ventura.

John Torrance, City Attorney, Marjorie Baxter, Assistant City Attorney; Freilich, Stone, Leitner & Carlisle and Katherine E. Stone and Margaret A. Sohagi, for Defendants, Respondents, and Petitioners City of Simi Valley and City Council of The City of Simi Valley.

No appearance for Respondent Superior Court of the County of Ventura.

Baker & McKenzie and Robert H. Philibosian, for Real Party in Interest Marr Ranch Associates, Inc.

Burke, Williams & Sorensen and J. Robert Flandrick, Virginia R. Pesola as Amici Curiae on behalf of Petitioner City of Simi Valley.

Pacific Legal Foundation and Ronald A. Zumbrun, Edward J. Connor, Jr., Timothy V. Kassouni as Amici Curiae on behalf of Real Party in Interest Long Beach Equities, Inc.

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 6

Hamilton & Samuels
Karen J. Lee
4000 Macarthur Blvd.
Suite 5700
Newport Beach, CA. 92660

RE: Long Beach Equities, Inc.
VS.
Ventura, County of

2 Civil B045047
Ventura No 103364

EXHIBIT D

CERTIFIED FOR PUBLICATION
[NO CHANGE IN JUDGMENT]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

COURT OF APPEAL-SECOND DIST.
FILED
JUL 25 1991
ROBERT N. WILSON, Clerk

Deputy Clerk

LONG BEACH EQUITIES, INC., etc.,
Plaintiff and Appellant,
v.
COUNTY OF VENTURA, et al.,
Defendants and Respondents.

2d Civil No. B045047
(Super. Ct. No. 103364)
(Ventura County)

THE CITY OF SIMI VALLEY, et al.,
Petitioners,
v.
SUPERIOR COURT OF THE
COUNTY OF VENTURA,
Respondent.

LONG BEACH EQUITIES, INC., et al.,
Real Parties in Interest.

No. B046558

ORDER MODIFYING OPINION AND DENYING REHEARING

THE COURT:

It is ordered that the opinion on rehearing filed herein on June 27, 1991, be modified in the following particulars:

1. On page 25, lines 3 and 4, delete the words "tentative tract map" and replace them with the following words: "specific plan".

There is no change in the judgment.

Long Beach Equities, Inc.'s petition for rehearing is denied.

EXHIBIT E

Second Appellate District,
Division Six,
No. B045047 / BO46558
S022332

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
SEP 26 1991
Robert Wandruff, Clerk

Deputy

LONG BEACH EQUITIES INC.,
Appellant
v.
COUNTY OF VENTURA Et Al.,
Respondents

And Companion Cases

Petition for review DENIED.

The request for an order directing depublication of the opinion is denied.

LUCAS
Chief Justice

EXHIBIT F

SUPERIOR COURT OF CALIFORNIA
COUNTY OF VENTURA

F I L E D
JUNE 30 1989
Richard D. Dean, County Clerk

Deputy

LONG BEACH EQUITIES, INC., a California corporation; MARR RANCH ASSOCIATES, INC., a California corporation,
Petitioners and Plaintiffs,

vs.

COUNTY OF VENTURA; BOARD OF SUPERVISORS OF THE COUNTY OF VENTURA; PLANNING COMMISSION FOR THE COUNTY OF VENTURA; THE CITY OF SIMI VALLEY; THE CITY COUNCIL OF THE CITY OF SIMI VALLEY, DOES 3 through 50,
Respondents and Defendants.

No. 103364

JUDGMENT FOLLOWING THE COURT'S SUSTAINING WITHOUT LEAVE TO AMEND THE DEMURRER OF THE COUNTY OF VENTURA, THE BOARD OF SUPERVISORS OF THE COUNTY OF VENTURA, AND THE PLANNING COMMISSION FOR THE COUNTY OF VENTURA TO THE FIRST AMENDED PETITION FOR WRIT OF MANDATE AND AMENDED COMPLAINT AND SUPPLEMENTAL COMPLAINT

On May 5 and May 25, 1989, there came on for hearing in courtroom 44 of the above-entitled court the demurrer of the County of Ventura, the Board of Supervisors of the County of Ventura, and the Planning Commission for the County of Ventura to the First Amended Petition for Writ of Mandate and Amended Complaint and Supplemental Complaint. Dennis L. Slivinski, Assistant County Counsel, appeared on behalf of the demurring parties. Paul R. Hamilton and Karen J. Lee of Hamilton and Samuels appeared on behalf of Long Beach Equities, Inc., and Robert H. Philibosian of Baker and McKenzie appeared on behalf of Marr Ranch Associates, Inc. Marjorie Baxter, Assistant City Attorney for the City of Simi Valley, and Deborah J. Fox and Katherine E. Stone of Freilich, Stone, Leitner & Carlisle announced that they were appearing as observers on behalf of the City of Simi Valley and the City Council of the City of Simi Valley.

The court read and considered respondents' demurrer to the first amended petition and memorandum of points and authorities in support thereof, petitioners' memorandum of points and authorities in opposition to defendants' demurrer, respondents' reply, petitioners' supplemental opposition and respondents' supplemental reply. The court also heard and considered oral argument of counsel.

The court has taken judicial notice of the following documents:

1. Resolutions of the Ventura County Board of Supervisors of August 12, 1969; March 30, 1976; and February 12, 1985, adopting the Guidelines for Orderly Development.

2. The land use maps dated September 15, 1981; April 17, 1984; and May 24, 1988, showing the property which is the subject of this litigation to be designated Open Space. The outline of the subject property appear-

ing on the certified copies of the land use maps is based on the diagram on the aerial photograph attached as Exhibit A to the First Amended Petition/Complaint. Counsel have stipulated that the clearer copies of these maps are found at Exhibit 2 of the First Request for Judicial Notice filed November 28, 1988.

3. A map based on official Assessor's parcel maps of the subject property showing current zoning adopted by the Ventura County Board of Supervisors.

4. Ventura County Ordinance Code sections 8105-0 to and including 8105-4.

5. Resolution of the Ventura County Board of Supervisors, dated March 3, 1970, designating the governing body of the City of Simi Valley as the Board of Directors of the Simi Valley County Sanitation District.

6. Resolution of the Ventura County Board of Supervisors, dated June 14, 1977, designating the governing body of the City of Simi Valley as the governing body of the Ventura County Waterworks District No. 8.

7. Maps showing the boundaries of Ventura County Waterworks District No. 8 and Simi Valley County Sanitation District.

8. A staff report regarding Parcel Map Waiver No. 98 and a Notice of Approval of Parcel Map Waiver, three pages of the June 1987 Land Use Element of the Ventura County General Plan, Resolution No. 222 of the Board of Supervisors and seven pages of the City of Simi Valley's General Plan. These four items were attached as Exhibits A through D to petitioners' supplemental opposition to the demurrer filed May 4, 1989.

9. The form and content section of the Ventura County General Plan Land Use Element attached as Exhibit 1 to the respondents' supplemental reply filed May 15, 1989.

Based on material facts alleged in the First Amended Petition, which the court has assumed to be true for purposes of ruling on the demurrer, and on the matters of which the court has taken judicial notice, the court sustains the demurrer without leave to amend as to all alleged causes of action on the ground that they do not allege facts sufficient to constitute a cause of action against the demurring defendants/respondents.

With regard of the alleged denial of equal protection, the court has considered the representations of counsel for petitioners that he would amend to allege several developments approved in the unincorporated area which have features similar to petitioners' proposed development, such as Lake Sherwood, Rancho Matilija, Oak Park, and the proposed Franciscan project. However, the addition of these alleged similarities would not be sufficient to overcome a significant difference in that petitioners' proposed development would be provided urban services, particularly sewer and water, from entities under the jurisdiction and control of the City Council of the City of Simi Valley. This, in the court's view, is a sufficient rational basis to require annexation as a condition of the development of petitioners' project.

Having sustained the demurrer without leave to amend as to all alleged seven causes of action of the First Amended Petition, the court hereby dismisses the First Amended Petition for Writ of Mandate and Amended Complaint and Supplemental Complaint as to the defendants County of Ventura, Board of Supervisors of the County of Ventura and the Planning Commission for the County of Ventura.

IT IS SO ORDERED.

Dated JUN 30 1989

/s/ Bruce A. Thompson

Judge of the Superior Court

John Torrance, City Attorney
Marjorie A. Baxter
Assistant City Atatorney
City of Simi Valley
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Deborah J. Fox
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Los Angeles, California 90025
(213) 444 7805
Attorneys for Respondents / Defendants
City of Simi Valley, et al.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF VENTURA

F I L E D
NOV 22 1989
Sheila Gonzalez, Superior Court
Executive Officer and Clerk
By _____, Deputy

LONG BEACH EQUITIES, INC., a California corporation; MARR RANCH ASSOCIATES, INC., a California corporation,
Petitioners and Plaintiffs,

vs.

COUNTY OF VENTURA; BOARD OF SUPERVISORS OF THE COUNTY OF VENTURA; PLANNING COMMISSION OF THE COUNTY OF VENTURA; THE CITY OF SIMI VALLEY; THE CITY COUNCIL OF THE CITY OF SIMI VALLEY, DOES 3 through 50,
Respondents and Defendants.

CASE NO. 103364

ORDER RE CITY'S DEMURRER TO
FIRST AMENDED PETITION AND COMPLAINT

CITY OF SIMI VALLEY and CITY COUNCIL OF SIMI VALLEY'S ("City's") demurrer to the first amended petition and complaint came on for hearing on October 26, 1989 before the Honorable Bruce A. Thompson, Judge of the Superior Court, Marjorie Baxter, Assistant City Attorney, and Freilich, Stone, Leitner & Carlisle by Katherine E. Stone appearing for defendant and moving party City; Hamilton and Samuels, Karen J. Lee appearing for plaintiff Long Beach Equities; no appearance for plaintiff Marr Ranch Associates.

The court having reviewed the papers submitted, taken judicial notice of the documents submitted by the City, and considered the arguments of counsel rules, and orders as follows:

1. The demurrer is sustained without leave to amend as to the third (Discrimination in Application in Zoning and Land Regulation, Denial of Equal Protection of Law), fourth (Deprivation of Civil Rights) and fifth (Conspiracy to Deprive Plaintiffs of Civil Rights) causes of action and the third, fourth and fifth causes of action are hereby dismissed.

2. The seventh cause of action (Petition for Writ of Mandate Against County Defendants) is not applicable to the City. The demurrer of the County defendants having been previously sustained without leave to amend the seventh cause of action is hereby dismissed.

3. The demurrer is overruled as to the first (Inverse Condemnation), second (Denial of Substantive and Procedural Due Process of Law) and sixth (Declaratory and Injunctive Relief) causes of action.

4. City defendants to answer on or before November 17, 1989.

Dated: NOV 22 1989

BRUCE A. THOMPSON

BRUCE A. THOMPSON
Judge of the Superior Court